Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

FRATERNAL ORDER OF POLICE, LODGE #20,

Petitioner,

v.

UNITED STATES OF AMERICA; CITY OF MIAMI; and BOARD OF TRUSTEES OF THE CITY OF MIAMI FIRE FIGHTERS AND POLICE OFFICERS RETIREMENT TRUST,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI BY PETITIONER, FRATERNAL ORDER OF POLICE, LODGE #20

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QUESTIONS PRESENTED FOR REVIEW

1. Does the panel decision in the present case concerning the appropriate remedy for violation of a court-ordered affirmative action program conflict with the decision of the United States Court of Appeal for the Third Circuit in *Taxman v. Board of Education*, 1 F.3d 1547 (3d Cir. 1995) and the decisions of the United States Court of Appeals for the Fifth Circuit in *United States v. United States Steel*, 520 F.2d 1043 (5th Cir. 1975) and *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 260 (5th Cir. 1974)?

2. Is it an abuse of discretion by a United States District Court, acting as a fact finder, to award complete, make-whole relief to an entire class of employees excluded from consideration for promotion solely on the basis of race, when the employer does not challenge the finding of intentional discrimination?

LIST OF PARTIES TO THE PROCEEDING

Fraternal Order of Police, Miami Lodge #20

City of Miami, Florida

United States of America

Board of Trustees of the City of Miami Firefighters and Police Officers Retirement Trust, Intervenor

Lawyers Committee for Civil Rights Under Law, Amicus Curiae

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STATEMENT OF THE BASIS FOR JURISDICTION

Since 1977, the City of Miami has operated its civil service program under a federal court-ordered affirmative action plan (hereinafter, the "Consent Decree"). App. 33. On March 13, 1998, the District Court entered the

contested Order Granting Motions For Rule to Show Cause filed by the Petitioner. App. 22. The order found the City of Miami to be in violation of the Consent Decree concerning the manner in which it promoted certain persons to the ranks of police sergeant and police lieutenant in 1992. The order directed make-whole relief including back pay, seniority, pension benefits, and, where applicable, promotion for all persons bypassed for promotion on the basis of race who held a higher numerical rank on the City's promotional test registers.

The City of Miami and the United States appealed to the United States Court of Appeals for the Eleventh Circuit, challenging only the remedy. On November 17, 1999, the Eleventh Circuit vacated the District Court order in part and remanded the case to provide only a pro-rata, monetary remedy. App. 1. Petitioner moved for rehearing and rehearing en banc, which was denied on February 11, 2000. App. 62. Petitioner seeks review of the Eleventh Circuit's decision of November 17, 1999, on the basis that it is in conflict with established precedent and in derogation of the make-whole principles of Title VII.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

Petitioner certifies that notification has been served on the United States as is required by Rule 29.4.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

Miami, Florida, Code §§ 40-85, 40-86, 40-87, 40-88

Miami, Florida, City Charter § 36:

> (d) *Rules; examinations; eligible lists; certification of vacancies.* Subject to the approval of the commission, the board shall adopt, amend, and enforce a code of rules and regulations which shall have the force and effect of law providing for appointment and employment in all positions in the classified service, based on merit, efficiency, character, and industry; shall make investigations concerning the enforcement and effect of this article and of the rules adopted; and shall make an annual report to the commission. The chief examiner shall provide examinations in accordance with regulations of the board and maintain lists of eligibles of each class of the services of those meeting the requirements of said regulations. Positions in the classified service shall be filled from such eligible lists upon requisition from and after consultation with the city manager. When positions are filled, the employment officer shall so certify, by proper and prescribed form, to the director of finance and to the director of the department in which the vacancy exists.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

In 1992, the City of Miami discriminated against the candidates for promotion to the ranks of sergeant and lieutenant within the City of Miami Police Department, when it engaged in a policy and practice of reserving specific promotional spots solely for members of a particular race in violation of a 1977 Consent Decree. The Fraternal Order of Police, Lodge 20 (hereinafter "FOP 20"), the certified bargaining agent for members of the City of Miami Police Department holding the civil service ranks of police officer, sergeant, lieutenant and captain, instituted two show cause proceedings against the City for violation of the Consent Decree. On March 13, 1998, the District Court issued a post-judgment order finding the City of Miami in contempt of the Consent Decree in connection with the 1992 sergeant and lieutenant promotions. App. 22. The nature of the relief awarded was a make-whole remedy to all persons who were excluded from consideration for promotion on the basis of race.

The FOP alleged, and the District Court found, that the City's selective certification and appointment of African-American promotional candidates to certain promotional positions was violative of the Consent Decree and resulted in an unlawful "set-aside" of promotional positions thereby eliminating those positions from competition by all non-African-American promotional candidates. App. 22. For such violations, the District

Court directed that all affected persons on the promotional register should be made whole.[1]

The District Court granted back pay, back seniority, front pay, promotions, and pension rights as make-whole damages for all affected members of the promotional ranks. App. 22. The District Court also noted that such relief would act "to serve as a reminder that the City must, in all of its personnel policies, follow the goal of the consent decree which is to create a race neutral work place." App. 28.

The City of Miami and the United States appealed, arguing that the relief awarded by the District Court constituted an abuse of discretion. A three member panel of the Eleventh Circuit reversed, holding that the District Court's relief was overbroad. The Eleventh Circuit determined that as a matter of law, relief should be limited to a pro-rata share of the economic value of one sergeant's promotion and one lieutenant's promotion. *See United States v. City of Miami*, 195 F.3d 1292, 1300 (11th Cir. 1999), *rehearing denied*, ___ F.3d ___ (11th Cir. 2000). The Eleventh Circuit's jurisdiction was based on 28 U.S.C. § 1291.

B. Statement of Facts

In 1993, FOP 20 filed two motions for orders to show cause why the City of Miami should not be held in

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[1] The promotional register, under Miami's Civil Service System, is the numerical ranking of persons successfully completing the Civil Service promotional exam.

contempt concerning promotions to lieutenant and sergeant. The first motion alleged that the City discriminated on the basis of race by certifying candidates for promotion out of rank order in response to a request from the police chief for African-American lieutenants to supervise undercover narcotics operations in predominately African-American neighborhoods, claiming that the supervisor needed to be able to speak "nontraditional English". The second motion alleged that the City's certification of Creole-speaking candidates to the rank of sergeant, was a pretext for promoting individuals of Haitian-American descent.

Pursuant to the City's Civil Service Rules, the City certifies a list of eligible candidates for promotion based on passing exam scores. App. 71. Once a list of eligible candidates has been certified, the Chief of Police is permitted to choose the candidate(s) to be promoted based solely on an interview and other subjective factors. Thus, once the list has been certified, a candidate's exam score plays no role in this final decision-making process. A reviewing court is therefore unable to determine an outcome for this ad hoc process. Neither of the persons who received the set-aside promotions had an exam score high enough to allow them to be certified for promotion. The persons selected bypassed large numbers of candidates with higher exam scores solely based on the City's decision to set aside certain promotions for candidates of a particular ethnicity.

As recognized by the Eleventh Circuit, the nature of the City's promotion process precluded a determination of which candidate would have been promoted absent discrimination by the City. "We know the qualified pool

of eligible candidates, based on the promotional exam results, who were bypassed for promotion. All told, there were twenty-three certified lieutenant candidates and twelve certified sergeant candidates not promoted. We also know that one promotion for each of these ranks was received by a candidate who would not have been eligible absent the City's discrimination." *See United States v. City of Miami*, 195 F.3d at 1298. Yet, due to the City's "wholly subjective interview process" "it is difficult, if not altogether impossible" to determine which candidates would have been promoted. *Id.*

The District Court did not limit the remedy to the certified candidates. The District Court found that because the persons selected could not have been certified absent unlawful discrimination, that any candidate with a higher exam score was entitled to relief. While acknowledging that no specific form of relief is dictated by Title VII or the case law, the Eleventh Circuit improperly substituted its judgment for that of the trier of fact and limited relief to the economic value of one lieutenant's promotion and one sergeant's promotion to be divided among only those candidates lawfully certified for promotion.

ARGUMENT

I. **THE PANEL DECISION IN THE PRESENT CASE CONCERNING THE APPROPRIATE REMEDY FOR VIOLATION OF A COURT-ORDERED AFFIRMATIVE ACTION PROGRAM CONFLICTS WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN *TAXMAN V. BOARD OF EDUCATION*, 1 F.3D 1547 (3D CIR. 1995) AND THE DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *UNITED STATES V. UNITED STATES STEEL*, 520 F.2D 1043 (5TH CIR. 1975) AND *PETTWAY V. AMERICAN CAST IRON PIPE CO.*, 494 F.2D 260 (5TH CIR. 1974).**

II. **IT IS NOT AN ABUSE OF DISCRETION BY A UNITED STATES DISTRICT COURT, ACTING AS A FACT FINDER, TO AWARD COMPLETE, MAKE-WHOLE RELIEF TO AN ENTIRE CLASS OF EMPLOYEES EXCLUDED FROM CONSIDERATION FOR PROMOTION SOLELY ON THE BASIS OF RACE, WHEN THE EMPLOYER DOES NOT CHALLENGE THE FINDING OF INTENTIONAL DISCRIMINATION.**

In *Albemarle Paper Company v. Moody*, 422 U.S. 405, 417-421 (1975) this Court recognized that a central purpose behind Title VII is to make persons whole for injuries suffered on account of unlawful employment discrimination. "Where racial discrimination is concerned, the district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Id.* at 418 (citations omitted). The Eleventh Circuit's decision creates an

unwarranted and arbitrary exception to this make-whole remedy.

Following the *Albermarle* decision, the centrality of "make-whole" relief has repeatedly been reaffirmed. The Eleventh Circuit has specifically recognized that the basic purpose of Title VII relief is to make whole victims of unlawful discrimination. *See Darnell v. City of Jasper*, 730 F.2d 653, 655 (11th Cir. 1984); *Nord v. United States Steel Corporation*, 758 F.2d 1462, 1470-1473 (11th Cir. 1985). The Eleventh Circuit has further recognized that Title VII vests the district courts with broad equitable discretion to fashion "the most complete relief possible." *See Darnell*, 730 F.2d at 655; *Nord*, 758 F.2d at 1470.

The Eleventh Circuit's decision in this case, however, focused on the cost to the discriminating employer of make-whole relief, rather than on the proper objective of correcting the effects of intentional discrimination and making whole the injured plaintiffs. Moreover, the decision constitutes an improper de novo review of the trial court's discretionary actions, while ignoring the possibility of alternative forms of relief. These are functions of the district court and is the reason why great deference has been accorded to resolve competing interests under such circumstances. As a result, the Eleventh Circuit's decision is in conflict with *Taxman v. Board of Education*, 91 F.3d 1547 (3d Cir. 1995); *United States v. United States Steel Corp.*, 520 F.2d 1043, 1055 (5th Cir. 1975) and *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974).

In cases where it is impossible to determine which particular claimant, absent discrimination, would have

received what promotion without falling into a "quagmire of hypothetical judgment", classwide relief is appropriately awarded. *See United States v. United States Steel Corp.*, 520 F.2d 1043, 1055 (5th Cir. 1975); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974); *see also Trout v. Garrett*, 780 F.Supp. 1396, 1407 (D.D.C. 1991) (holding that complete relief is available where it is impossible to determine which candidate would have received a promotion); *Kyriazi v. Western Electric Co.*, 465 F.Supp. 1141 (D.N.J. 1979) (holding that where employer could not prove which candidate would have received promotion, all candidates were entitled to full backpay award).

In the instant case, the Eleventh Circuit concluded that each Plaintiff class member was only entitled to a proportional share of the full monetary value of a promotion. 195 F.3d at 1300. The Court reasoned that:

> "In this case, each class member stood a much slimmer chance of obtaining one of the two available promotions. Only one of twelve sergeant candidates (roughly eight percent of the sergeant class) and one of twenty-three lieutenant candidates (roughly four percent of the lieutenant class) actually would have received a promotion absent the City's discrimination. In short, the district court's award placed the officers in the class in a substantially better position than they would have occupied absent the City's discrimination by dramatically inflating their actual chances of obtaining only one of two available positions. While cognizant of the need to compensate victims of discrimination, even where relief calculations are complicated by the size of the class, we conclude that 'make whole'

> remedial relief awards, at the very least, must be proportionate to a court's best determination of the actual compensatory losses of a class. In this way, we balance between our twin duties to fairly compensate discrimination victims and yet avoid punitive remedial relief awards." *Id.* at 1301.

In *Taxman v. Board of Education*, 91 F.3d 1547 (3d Cir. 1996) the Third Circuit reached a contrary conclusion. *Taxman* involved a Title VII action challenging layoff decisions under a school board's affirmative action plan preferring minority teachers over equally qualified non-minority teachers. The district court determined that the Board of Education violated Title VII by granting non-remedial racial preferences in order to promote racial diversity. *Id.* at 1549-1550.

On the issue of damages, the district court in *Taxman* determined that the plaintiff stood a 50% chance of keeping her job had there been no unlawful discrimination. *See Taxman* at 1565. As a result of the Title VII violation, the district court awarded 100% back pay for the period that plaintiff was laid off. The defendant Board of Education appealed, arguing that the award of 100% back pay was improper because the plaintiff stood no more than a 50% chance of keeping her job. On appeal, the Third Circuit affirmed holding that it was appropriate for the defendant, as wrongdoer, to bear the consequences of its actions. "In deciding backpay issues, the District Court has wide latitude to locate a just result and to further the make-whole remedy of Title VII in light of the circumstances of a particular case." *Id.* at 1565 (citations omitted).

An employer should not be permitted to frustrate "make-whole" relief by using a subjective promotion device and then later claim that it is impossible to redetermine the proper promotion decision. Yet, the City refused to introduce any evidence regarding which candidates might have received the promotion and instead took the position that *each* candidate on the promotional register was equally qualified. The Eleventh Circuit has consistently held that employees should not be denied a full remedy due to the difficulty of fashioning relief and that uncertainties should be resolved in favor of the injured employee. *See Pettway,* 494 F.2d at 260-261 (indicating that back pay awards are properly computed at the maximum rates possible where precision is impossible). Moreover, "unrealistic exactitude" is not required and "uncertainties in the relief process should be resolved against the discriminating employer." *See United States v. United States Steel Corp.,* 520 F.2d at 1050; *Pettway,* 494 F.2d 211, 260-261; *Albemarle,* 422 U.S. 424-425 (holding that a district court has wide latitude to "locate a just result" and "to further" the make-whole remedy of Title VII in light of the circumstances of a particular case); *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (holding that district courts have both the power and duty to fashion a complete remedy); *Nord,* 758 F.2d at 1470; *Darnell,* 730 F.2d at 653.

In this case, the relief awarded by the district court was appropriate. The district court found that the City had engaged in a discriminatory practice. As a result of that discrimination, each higher ranking individual who was not "selectively certified" due to their race, was injured by such discrimination. The City and the United

States failed to present any evidence to the district court establishing which promotional candidates would have received a promotion but for the discrimination. The only circumstance which the parties knew with any certainty was that the candidates improperly promoted had a zero percent chance of a promotion, absent the City's discriminatory actions. Thus, the District Court correctly determined that all promotional candidates denied advancement by being denied the opportunity to compete for such promotional positions due to race and ethnicity were entitled to complete relief.

To allow the City to disregard the promotional rights of the injured employees while only paying the cost of a single promotion perpetuates the problem and makes no one whole. In *Albemarle Paper Co.*, this Court observed that "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Albemarle Paper Co.*, at 417-18.

In *Aderand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) this Court held that the application of race-conscious relief is constitutional only when it is narrowly tailored to further compelling governmental interests. In his concurring opinion, Justice Scalia stated:

> "In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction. *See City of Richmond v. J.A. Croson*, 488 U.S. 469, 520 (1989) (Scalia, J. concurring in judgment). Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such

> thing either as a creditor or a debtor race . . . to pursue the concept of racial entitlement even for the most admirable or benign of purposes is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government we are just one race here. It is American. *Aderand* at 219.

The District Court's order appropriately awarded actual victims of discrimination back pay, back seniority rights, promotions, front pay and pension benefits. It is also significant that such relief was awarded in the absence of any showing by the City or the United States that any member of the Plaintiff class would not have received a promotion but for the discrimination. Moreover, those who were bypassed can never re-take promotional exams missed due to the passage of time. They can never recover, without the remedy granted by the District Court, the lost earnings and salary rate toward retirement and the lost seniority which determines the right to take future promotional exams, assignments, vacations and other job benefits. The recipients of the illegal promotions were neither victims of discrimination nor did the exam have adverse impact on any minority group. They continue to enjoy the fruits of the City's wrongful conduct to the detriment of every other officer who successfully passed the exam, but was excluded from consideration due to the City's pursuit of a system of racial quotas.

The Eleventh Circuit's decision is also inconsistent with the policy of make-whole relief supported by *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976); *Taxman v. Board of Education, Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996); *EEOC v. Martin Marietta Corp.*,

819 F.Supp. 1030 (M.D. Fla. 1993). The award of such relief is not only proper and well within the discretion of the trial court to grant, it is an essential element of any make-whole remedy.

The Eleventh Circuit's decision departs from established precedent not only because it allows an employer to benefit from its wrongful conduct, but also because the Eleventh Circuit improperly encroaches upon the lower court's authority to craft a proper and complete remedy. By directing the lower court to award a pro rata share to each candidate, the panel precludes the possibility of alternative relief. *See Pettway*, 494 F.2d 211, 262 n. 151 (indicating that the process of computation is not an "either or" approach and that wide discretion should be provided to the district court). Despite that "wide discretion" enjoyed by the trier of fact, the Eleventh Circuit simply substituted its judgment for that of the District Court judge who had been charged with the daily supervision of the Consent Decree for nearly two decades. The abuse of discretion occurred in the Eleventh Circuit and, in the interest of justice, demands a remedy.

In reaching its decision, the Eleventh Circuit placed great weight on the alleged harm to the City while at the same time minimizing the harm to the Plaintiff class.[2] The

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[2] This is not the first time the City of Miami has been required to accord class-based relief due to the unlawful grant of employment rights to a small number of persons. *See City of Miami v. Butcher*, 303 So.2d 378, 379 (Fla. Dist. Ct. App. 1974) (holding that class-wide relief was appropriate for all similarly situated employees).

Court theorized that the potentially numerous promotions at issue might "radically restructure the City's police force." *See United States v. City of Miami*, 195 F.3d at 1302. The Court reached this determination, however, without any analysis of the City's likely future promotion needs. Moreover, the Court did not even consider the possibility of phasing in the promotions over time or of reducing the number of promotions. *See, e.g., Claiborne v. Illinois Central Railroad*, 583 F.2d 143, 148 (5th Cir. 1978) (rejecting an employer's assertion that promotions should be limited to a fixed number of claimed vacancies). These issues are properly determined by the district court, not through a de novo review on appeal without a sufficient record.

Furthermore, at the same time that it provides woefully inadequate relief for the Plaintiff class, the Eleventh Circuit erroneously inflated the harm of make-whole relief to the City. The calculations relied upon by the Eleventh Circuit do not address the fact that throughout the twenty-four year history of Miami's consent decree, employees have been promoted, retired or passed away. The workforce is not static. The period since the challenged rules to show cause were filed is no different. This fact is significant because it undermines the Court's conclusion that the relief was excessive.

CONCLUSION

This Court has repeatedly enforced the concept of make-whole remedies for victims of discrimination. Yet, in this case, a different class of victims has been relegated to a lesser form of relief which protects none but the offender. The Petitioner respectfully asserts that the Eleventh Circuit's decision constitutes an irreconcilable conflict with this Court's decisions and is in conflict with prior decisions by the Third, Fifth and Eleventh Circuits. Wherefore, for the foregoing grounds and reasons, FOP 20 respectfully prays this Honorable Court to grant the FOP's Petition for Certiorari.

Respectfully submitted,

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UNITED STATES of America, Plaintiff-Appellant,
v.
CITY OF MIAMI, Defendant-Appellant,

Fraternal Order of Police, Lodge No. 20, Defendant-Appellee,
Board of Trustees of the City of Miami Firefighters' and Police Officers' Retirement Trust, Intervenors-Appellants.

No. 98-4626.

United States Court of Appeals,
Eleventh Circuit.

Nov. 17, 1999.

Albertine B. Smith, Myrna D. Bricker, Miami, FL, Dennis J. Dimsey, Marie K. McElderry, U.S. Dept. of Justice, Civil Rights Div., Washington, DC, for Plaintiff-Appellant.

Robert David Klausner, Hollywood, FL, for Defendant-Appellee.

Bonnie Joyce Losak-Jimenez, Joseph W. Beasley, Kelly, Black, Black, Byrne & Beasley, Miami, FL, Stephen H. Cypen, Cypen & Cypen, Miami Beach, FL, for Intervenor.

Appeals from the United States District Court for the Southern District of Florida.

Before ANDERSON, Chief Judge, MARCUS, Circuit Judge, and MILLS*, Senior District Judge.

MARCUS, Circuit Judge:

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* Honorable Richard Mills, Senior U.S. District Judge for the Central District of Illinois sitting by designation.

This appeal is the latest chapter in a lengthy litigation saga over a 1977 nondiscrimination consent decree between the United States of America, the City of Miami, and the Fraternal Order of Police, Lodge No. 20. In this iteration, the Fraternal Order of Police ("Appellee"), on behalf of a class of white and Hispanic police officers, brought two civil contempt actions against the City of Miami for "reverse" race discrimination in its 1992 police officer promotion practices. The district court found that the City had discriminated on the basis of race in its "special certification" of several minority promotion candidates, resulting in the unlawful promotion of one black lieutenant and one black sergeant. As a result, the district court held the City in civil contempt of the 1977 consent decree. The district court then awarded broad "make-whole" relief to all "adversely affected" police officers, as if each of these officers actually would have received one of the two promotions in 1992.

On appeal, the United States of America and the City of Miami ("Appellants") do not challenge the district court's finding of race discrimination or civil contempt. The sole issue before us is whether the district court abused its discretion in fashioning broad "make-whole" relief for the entire officer class. After a thorough review of the record and the parties' briefs, we conclude that the district court's chosen remedy was excessive and that it should have divided the monetary value of the two promotions on a pro rata basis amongst the class of eligible candidates. We therefore vacate, in part, the judgment filed on March 13, 1998, and remand with instructions for its modification consistent with this opinion.

I.

The facts of this prolonged case began in 1975 when the United States of America sued the City of Miami, various City officials, and several police officer unions for discriminatory employment practices adversely affecting black, Hispanic, and female individuals in police hiring and promotion policies in violation of Title VII of the Civil Rights Act of 1964, the Fourteenth Amendment, and 42 U.S.C. §§ 1981 and 1983. The United States and the City agreed to settle the case, and the district court approved a consent decree in 1977 over the objections of a police union, the Fraternal Order of Police ("FOP"). The consent decree required the City to establish promotional "goals" for protected minority groups.[1]

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[1] The decree contains the following relevant provisions:

1. The defendant City of Miami, its officials, agents . . . are permanently enjoined and restrained from engaging in any act or practice which has the purpose or effect of unlawfully discriminating against any employee of, or any applicant, or potential applicant for employment with the City of Miami because of such individual's race, color, sex, or national origin. Specifically, the City shall not refuse to hire, promote, upgrade, train, or assign any individual, discharge any individual, or otherwise discriminate against any individual as an employee or applicant for employment with respect to compensation, terms, conditions, or privileges of employment because of race, color, sex, or national origin.

. . .

5. Goals

In order to eliminate the effects of past discriminatory practices against blacks, Latins, and women, the City shall adopt and seek to achieve as its long term goal the participation at all levels throughout its workforce of blacks, Latins, and women approximating their respective proportions in the City's

At the time, police promotion decisions were governed by a civil service rule, Ordinance No. 6945, known as the "Rule of One." The rule required the City to hire and promote certified applicants rigorously based on their designated rank order on the eligible candidate register. This rank order was determined solely by the results of the civil service promotional exam. On April 17, 1978, the Justice Department wrote a letter to the Miami City Manager outlining how the City's "Rule of One" adversely affected minority employees in violation of the consent decree. In July 1979, the City amended its civil service rules, adopting Ordinance No. 8977 which, among other things, substituted a "Rule of Eight" for the previous "Rule of One."

Under the new rule, eight candidates must be certified for each vacant position by the City Director of Personal Management. The first five candidates must be chosen in rank order from the results of the promotional exam. However, the Director also has the discretion, as affirmative action needs dictate, to certify three minority officers by exam rank order. For each additional vacancy, two candidates are to be added to the certified candidate pool: the officer with the next highest overall test score and the minority officer with the next highest test score. In addition, the City also passed a "special certification"

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labor force. . . . The purpose of this goal is to eliminate the substantial under-representation and uneven distribution of blacks, Latins, and women throughout the City's workforce. . . .

(b) Promotions

Subject to the availability of qualified applicants, promotional goals shall be established for minorities. . . .

rule, Rule 8.7, that allows the Director to certify up to three additional candidates if special requirements of sex or domicile are involved, or additional "special qualifications" are required. All certified candidates must score high enough on the promotional exam to satisfy the City's eligibility requirement. Once a list of eligible candidates has been certified, the Miami Police Chief conducts interviews with each certified candidate. The Chief then chooses his promotions based on the interview and other subjective factors. A candidate's written exam score plays no role in this final decision-making process.

In 1981, we finally heard the FOP's appeal of the consent decree. We approved the decree's provisions pertaining to the City and the United States, but adjudged those provisions pertaining to the FOP invalid because the FOP had not consented to the decree. *See United States v. City of Miami*, 614 F.2d 1322 (5th Cir.1980), vacated in part, 664 F.2d 435, 438-39 (5th Cir.1981) (en banc). On remand, the district court entered a consent order on April 4, 1983, to which the FOP voluntarily consented, that maintained in full force and effect the provisions of the earlier consent decree including the "Rule of Eight." The City still employs the "Rule of Eight" for all police hires and promotions.[2]

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[2] In 1983, the Miami Association of Firefighters, Local 587 challenged the City's implementation of the "Rule of Eight." The district court ruled that the union had signed the consent decree and therefore was bound by its terms, particularly including the "Rule of Eight." The district court also determined that the "Rule of Eight" was a legitimate tool to remedy the effects of past City discrimination. Local 587 appealed, but the appeal was dismissed for procedural reasons. *See United States*

On March 24, 1992, a promotional register for the rank of police lieutenant was posted by Director Angela Bellamy based on the results of the written exam. On April 8, Miami Police Chief Calvin Ross requested a certification list to fill sixteen police lieutenant vacancies. That same day, the Chief also requested in a memo that additional black candidates be "specially certified" for the position in accordance with Rule 8.7 to provide "positive role models and ethnic recognition." At the time, two of twenty-nine lieutenants (roughly seven percent) in the Miami police department were black. On May 18, Director Bellamy ordered that a portion of the promotional exam be re-administered due to errors in the original exam. A new exam was given on May 28 and June 1. On June 19, a new eligible register was established. On July 21, 1992, Police Chief Ross again requested Director Bellamy to issue a certification list to fill the sixteen vacancies. In a same-day memo, Ross also re-requested that additional black candidates be "specially certified" in accordance with Rule 8.7. The memo explained that black supervisors were needed to "understand and speak" non-traditional English. It also noted that black supervisors were needed because many drug enforcement operations occurred in black neighborhoods, requiring supervisors who could "blend" into the environs and make "command-level decisions."

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v. City of Miami, 2 F.3d 1497, 1500-01 (11th Cir.1993). Because this litigation involves only the Police and not the Fire department, we limit our discussion of the history of all relevant litigation involving the Fire Department to the extent necessary to understanding the issues raised in this appeal.

On July 23, three black male candidates were certified under the "special qualifications" requirement – Roberson Brown, Jr., Bobbie J. Meeks, and Gerald L. Darling. Each of these candidates, based on their exam scores, would have been eligible under the Rule of Eight for certification even if no "special certification" had taken place. All three received a promotion to lieutenant. However, as a result of the "special certification," three additional minority candidates were made eligible for a lieutenant promotion: Alphonso Erving, Javier Mayor, and Melvin Uptgrow. One of these candidates, Erving, actually received a promotion. Erving would not have been eligible for promotion if the "special certification" had not occurred – i.e., his test score was too low to be included in the normal certification pool of 38 candidates but was high enough to be included once the pool was expanded to 41 candidates based on the "special certification." In the end, four white males, six Hispanic males, four black males (including Erving), one Hispanic female, and one white female were promoted to lieutenant.

On November 25, 1992, Chief Ross requested Director Bellamy to add several Creole speakers through "special certification" to the eligible candidate register for five available police sergeant positions. Two Creole-speaking candidates were then added to an original candidate list of 16 persons: Gary Eugene, a black male ranked 107th on the eligible register and Mario Roman, a Hispanic male ranked 77th on the eligible register. Eugene's employment application recorded his Creole skills as advanced while Roman's application recorded his Creole skills as beginner. The police chief selected Eugene over Roman for one of the sergeant positions.

In 1993, the FOP filed two civil contempt motions against the City for consent decree violations stemming from these police lieutenant and sergeant promotions. The FOP argued that the City had employed its "special certification" procedure to unlawfully select officer candidates solely on the basis of race. The first motion alleged that the City's "special certification" of several black officers, in response to the Police Chief's request for black lieutenants to supervise undercover operations in predominantly black neighborhoods, was a pretext for promoting lieutenants on the basis of race. The second motion claimed that the City's "special certification" of two minority sergeant candidates, in response to the Police Chief's request for Creole-speaking sergeants, was a pretext for promoting sergeants on the basis of race or ethnicity. Both parties agreed to have the motions resolved on the case record and submitted a joint statement of undisputed facts on March 14, 1997. The United States requested an evidentiary hearing on the merits of the motions but the request was denied.

On March 13, 1998, the district court granted the FOP's motions. In so ruling, the court interpreted the consent decree to prohibit the designation of race as a "special qualification" for promotion. The court then dismissed both City "special certification" reasons as being pretextual. With respect to the lieutenant promotions, the court specifically found that since lieutenants serve a supervisory rather than a field capacity, there was no legitimate need to select candidates on the basis of their racial ability to "blend" into target communities. The

district court also found that the City had made no showing of how lieutenant command functions required officers of a particular race. As a result, the court determined that the City improperly certified three black candidates out of forty-one total candidates, of which, one improperly received a promotion.

With respect to the sergeant promotions, the district court found that ethnicity rather than Creole was the predominant "special qualification" for the "special certification" of two sergeant candidates. In its findings, the district court determined that police sergeants conducted their official responsibilities in English rather than Creole, and that the City had not tested sergeant candidates for language skills nor mentioned language in its advertisements for the sergeant promotions. The district court finally concluded that City civil service rules allowed for the temporary appointment of Creole-speaking sergeants if an emergency situation required it. One sergeant candidate, Gary Eugene, received a promotion after being improperly certified under the City's "special certification" procedures.

To remedy these certification violations of the consent decree and the concomitant promotion of one lieutenant and one sergeant, the district court ordered extensive "make-whole" relief for all police employees "adversely affected." This class includes the twenty-three lieutenant and twelve sergeant candidates eligible for promotion who were bypassed in favor of the two candidates improperly certified through the City's "special

certification" rule.[3] All class members were awarded full backpay, retroactive seniority, a fifteen thousand dollar

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[3] Because the district court's order never precisely defines the "adversely affected" officer classes, we now clarify which officers may receive remedial relief. At one point, the district court's order suggests, with respect to the sergeant class, that relief be granted to all persons ranked higher on the promotional register than Gary Eugene, who received one of the sergeant promotions after being improperly certified under the "special certification" rule. Eugene ranked 107th on the register based on his exam score. There were over seventy officers who ranked ahead of Eugene on the register who were not selected for one of the sergeant promotions. To the extent the district court order is read in this way, it constitutes a clear abuse of discretion. None of the officers ranking higher than Eugene, who were not certified under the Rule of Eight, were eligible for the sergeant promotion under the City's civil service promotion rules. The City's unlawful "special certification," which resulted in the certification of Eugene, did not deprive any eligible sergeant candidates from being added to the qualified candidate pool. The City's discriminatory practice merely added additional minority candidates to the pool of eligible candidates as already determined by the written exam. The district court order attempts to fashion "make-whole" compensatory relief to those officers who were adversely affected by the City's discrimination. In the Title VII context, we have held unambiguously that "make-whole" relief is intended to recreate employment conditions that would have existed absent an employer's discrimination – i.e., to place "the injured party in the position he or she would have been in absent the discriminatory actions." *Walters v. City of Atlanta*, 803 F.2d 1135, 1145 (11th Cir.1986) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *Nord v. United States Steel Corp.*, 758 F.2d 1462, 1470 (11th Cir.1985)). This holding draws support from the Supreme Court's conclusion in Stotts that Title VII "provide[s] make-whole relief only to those who have been actual victims of illegal discrimination." *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 580, 104 S.Ct. 2576, 81

lump-sum pension payment, and a one rank promotion from their current positions. This relief was ordered despite the fact that only one lieutenant and one sergeant candidate obtained a promotion in 1992 as a result of the City's unlawful certification procedures.

II.

We review the district court's remedial relief award pertaining to violations of the consent decree for an abuse of discretion. *See Miranda v. B & B Cash Grocery Store*, 975 F.2d 1518, 1534 (11th Cir.1992); *EEOC v. Guardian Pools Inc.*, 828 F.2d 1507, 1511 (11th Cir.1987).

District courts enjoy "wide discretion to fashion an equitable remedy for [civil] contempt that is appropriate to the circumstances." *Guardian Pools*, 828 F.2d at 1515. These sanctions may serve one of two broad purposes: (1) coercing the contemnor to comply with a court order, or (2) compensating a party for losses suffered as a result of the contemptuous act. *See Jove Engineering Inc. v. IRS*, 92 F.3d 1539, 1557 (11th Cir.1996) (citing *Guardian Pools*, 828 F.2d at 1515). In serving these ends, a court's civil contempt power is measured solely by the " 'requirements of full remedial relief.' " *Citronelle-Mobile Gathering, Inc. v.*

L.Ed.2d 483 (1984). The only police officers who were actually harmed by the City's discrimination were those officers who were "qualified" or eligible for the 1992 promotions according to the City's "Rule of Eight," and were passed-over in favor of the two ineligible officers. Twenty-three lieutenant and twelve sergeant officers fall into this group. Therefore, on remand, as we explain infra, we instruct that remedial relief only be granted to these thirty-five officers.

Watkins, 943 F.2d 1297, 1304 (11th Cir.1991) (quoting *Guardian Pools*, 828 F.2d at 1515) (citation omitted). However, a district court may not use the civil contempt power to impose what amounts to a punitive or criminal contempt sanction. *See In re E.I. DuPont De Nemours & Company-Benlate Litigation*, 99 F.3d 363, 368 (11th Cir.1996) (noting that it " 'requires no citation of authority to say that a district court may not, even unwittingly, employ a civil contempt proceeding to impose what, in law, amounts to a criminal contempt sanction' ") (quoting *Blalock v. United States*, 844 F.2d 1546, 1560 n. 20 (11th Cir.1988) (per curiam) (Tjoflat, J., specially concurring)). A punitive or criminal contempt sanction may only be fashioned after many of the due process safeguards afforded to defendants in criminal proceedings – the right to counsel, the privilege against self-incrimination, the presumption of innocence, and the right to a jury trial in serious cases – are provided to an alleged contemnor. *See Chandler v. James*, 180 F.3d 1254, 1267 (11th Cir.1999) (Tjoflat, J., specially concurring).

In this case, the district court conducted a civil rather than a criminal contempt proceeding. The district court ordered sweeping "compensatory" relief designed to "make-whole" those police officersadversely affected by the City's racially discriminatory certification procedures. Appellants do not challenge the district court's findings of racial discrimination and civil contempt. Therefore, the sole issue before us is whether the district court's broad remedial relief was an abuse of discretion. In answering this question, we draw on relevant principles of Title VII jurisprudence for evaluating "make-whole" compensatory relief.

The clear purpose of "make-whole" relief in the face of unlawful discrimination, whether in the Title VII or civil contempt context, is to " 'recreate the conditions and relationships that would have been had there been no "unlawful discrimination." ' " *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 372, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976)). Regrettably, no ex post method of fashioning remedial relief can ever truly recreate the past as it would have existed absent an employer's discriminatory conduct. Nevertheless, in this case, we must attempt to discern how the 1992 police promotions likely would have proceeded in the absence of the discriminatory "special certification" procedures implemented by the City. In one respect, our task is clear. We know the qualified pool of eligible candidates, based on the promotional exam results, who were bypassed for promotion. All told, there were twenty-three certified lieutenant candidates and twelve certified sergeant candidates not promoted. We also know that one promotion for each of these ranks was received by a candidate who would not have been eligible absent the City's discrimination. Therefore, it is plain that, in the absence of City discrimination, only one of these twenty-three lieutenant candidates and only one of these twelve sergeant candidates would have received a promotion.

However, it is difficult, if not altogether impossible years later, to discern which of these candidates would have been promoted. The Miami Police Department utilized a wholly subjective interview process to make its final promotion decisions. A candidate's exam score

played no role in his ultimate selection; it merely determined who would be "certified" or eligible for the final interview stage. Because of the subjective promotion process, the district court, quite apparently, could not identify which two officers, out of a total of thirty-five, should have received the 1992 promotions, and therefore it opted to employ a classwide promotion remedy instead. Previously, we have held that a classwide remedy may be employed in such circumstances. We have explained in the context of remedial backpay relief that a classwide remedy is appropriate when fashioning an individualized remedy would create a " 'quagmire of hypothetical judgment[s]' " as to which individuals, out of a large class, should receive remedial relief. *United States v. United States Steel Corp.*, 520 F.2d 1043, 1055 (5th Cir.1975) (quoting *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir.1974)).[4] In endorsing this approach, we have recognized that the only other relief alternatives would be unpalatable: either (1) randomly selecting several individuals from a large class for full "make-whole" relief, or (2) awarding no relief at all because specific individuals deserving of a "make-whole" remedy could not be identified from a victim class. As a result, we have observed that remedial relief does not require " 'unrealistic exactitude,' " and that " 'uncertainties' " in the relief process " 'should be resolved against the discriminating employer.' " *United States Steel*, 520 F.2d at 1050 (quoting *Pettway*, 494 F.2d at

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[4] Decisions by the former Fifth Circuit prior to September 30, 1981 constitute binding precedent in our circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir.1981).

260-61) (footnote omitted). However, at the same time, we have instructed that classwide remedies must strive for equity to both parties, and that the "key is to avoid both granting a windfall to the class at the employer's expense and the unfair exclusion of claimants by defining the class . . . too narrowly." *Pettway*, 494 F.2d at 262 n. 152.

While we agree with the classwide approach employed by the district court under the facts of this case, we find that the scope of the remedy imposed plainly was overly broad. Simply put, the district court treated each bypassed candidate as if he had a one hundred percent probability of receiving a promotion absent the City's discrimination. Each eligible promotion candidate received the full value of a 1992 promotion including backpay, retroactive seniority, a fifteen thousand dollar pension payment, and a one rank promotion from their current position. However, the district court itself acknowledged that each candidate stood much less than a one hundred percent chance of promotion since it could not identify two individuals who would have been likely promoted absent the City's discrimination. Based on mathematical probability alone, each lieutenant candidate stood only a one in twenty-three (or four percent) chance of promotion, and each sergeant candidate stood only a one in twelve (or eight percent) chance of promotion.

Given these very long odds, we conclude that the district court should have relied on a variant of the pro rata method for computing classwide remedial relief. This computation method awards each class member a proportional share of the full monetary value of the promotion for which they were eligible. In this case, each certified sergeant candidate not selected for the promotion would

receive a one-twelfth share; while each certified lieutenant candidate not selected for the promotion would receive a one-twenty-third share. In the past, we have recommended this specific method when, even after reasonable effort, a court is unable to differentiate between class members for remedial relief purposes. *See United States Steel*, 520 F.2d at 1055-56. In United States Steel, the former Fifth Circuit "commended" to the district court a pro rata methodology where there was clear proof of systematic race discrimination against a large class of black steelworkers but an unclear methodology for determining which specific individuals deserved backpay relief. *See United States Steel*, 520 F.2d at 1055-56. Several of our sister circuits also have recommended the pro rata method in similar circumstances.[5] *See Dougherty v. Barry*, 869 F.2d 605, 614-15 (D.C.Cir.1989) (directing district court to employ pro rata method where eight plaintiffs

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[5] The only notable exception to this approach occurred in *Taxman v. Board of Educ.*, 91 F.3d 1547 (3d Cir.1996), where the Third Circuit upheld full backpay relief to a teacher laid off as a result of a discriminatory school board affirmative action policy – even though the plaintiff would have maintained only a fifty-fifty chance of retaining her job absent the discrimination. *See id.* at 1565-66. In deciding between two teachers of equal seniority and merit for one position, the school board used race to break the tie, rather than a coin toss. The court of appeals concluded that because the plaintiff had a fifty percent probability of retaining her position and the school had unclean hands as the discriminatory wrongdoer, it was within the district court's discretion to award full backpay. *See id.* This case is distinguishable since it involved two individuals for one position, and a probability of retention (fifty percent) closely approximate to a more likely than not standard, rather than a very large class vying for only one position.

would have competed, absent defendant's discrimination, for two promotions); *Ingram v. Madison Square Garden Center, Inc.*, 709 F.2d 807, 812 (2d. Cir.1983) (vacating individual "make-whole" relief to a victim class that exceeded the number of actual vacancies and recommending pro rata method instead); *Hameed v. International Ass'n of Bridge, Structural, & Ornamental Iron Workers, Local Union No. 396*, 637 F.2d 506, 519-21 (8th Cir.1980) (recommending classwide pro rata backpay award given difficulty of determining which individuals, out of 45 plaintiffs, would have received apprenticeships absent discrimination); *Stewart v. General Motors Corp.*, 542 F.2d 445, 452-54 & n. 7 (7th Cir.1976) (favoring classwide pro rata award where defendant's subjective promotion procedures made it impossible to fashion an individualized remedy). We find the factual posture of *Dougherty* particularly germane. In *Dougherty*, eight white firefighters received promotions as compensatory relief for the District of Columbia Fire Department's racially discriminatory promotion practices, even though only two of the firefighters would have received a promotion absent the discriminatory practices. The court of appeals vacated the award, since each class member stood only a one in four chance of promotion, and instead recommended that each firefighter receive a pro rata share of the promotions' value. *Dougherty*, 869 F.2d at 614 (concluding that "in order to restore appellees to the position they would have occupied absent discrimination, the district court should have awarded each appellee a fraction of the promotions' commensurate value with the likelihood of his receiving one of the promotions") (citation omitted).

In this case, each class member stood a much slimmer chance of obtaining one of the two available promotions. Only one of twelve sergeant candidates (roughly eight percent of the sergeant class) and one of twenty-three lieutenant candidates (roughly four percent of the lieutenant class) actually would have received a promotion absent the City's discrimination. In short, the district court's award placed the officers in the class in a substantially better position then they would have occupied absent the City's discrimination by dramatically inflating their actual chances of obtaining only one of two available positions. While cognizant of the need to compensate victims of discrimination, even where relief calculations are complicated by the size of the class, we conclude that "make-whole" remedial relief awards, at the very least, must be proportionate to a court's best determination of the actual compensatory losses of a class. In this way, we balance between our twin duties to fairly compensate discrimination victims and yet avoid punitive remedial relief awards.

Under these facts, full remedial relief for all thirty-five officers – which is what the district court ordered – amounts to an unfair and sweeping windfall to the officer class and an abuse of the district court's discretion to award remedial relief. Its estimated cost would be around nine million dollars.[6] However, the estimated monetary

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[6] The estimated backpay differential is $68,000 for each lieutenant and $58,000 for each sergeant, totaling around $2.2 million dollars. The lump-sum pension payments amount to $525,000 ($15,000 for each of the thirty-five officers). The City Retirement Trust also estimates that lost retirement benefits, for the entirety of an officer's career, would amount to another

value of the two lost promotions is only a little over five hundred thousand dollars. To be sure, the fashioning of remedial relief is a highly fact-specific inquiry best left to the discretion of district courts. That said, the unambiguous goal of "make-whole" relief is to compensate persons who have actually suffered from unlawful discrimination for their actual compensatory losses. Therefore, remedial relief must be constructed with a close eye towards an employer's likely promotion practices and those class members likely to have been promoted had there been no discrimination. *See Ingram*, 709 F.2d at 812 (observing that "remedial relief should be granted only to those class members who would have filled vacancies had there been no discrimination"). We find the nexus between thirty-five candidates and only two promotion slots far too disproportionate to sustain full remedial relief for the entire class.

In fact, the amount awarded by the district court so exceeds the monetary value of the lost promotions that we can only interpret the award as punitive in nature. The "compensatory" civil contempt class award is eighteen times greater than the actual value of the two lost promotions. While we previously have recognized that the line between civil and criminal contempt sanctions is not "always clear," *Chandler*, 180 F.3d at 1267 (Tjoflat, J., specially concurring), and that we must draw such conclusions from " 'the character of the relief itself,' " *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 828, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) (citation

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$180,000 for each officer or $6.3 million dollars for the entire officer class.

omitted), this "compensatory" award plainly is so excessive as to be punitive. Moreover, the district court's award of thirty-five retroactive promotions, where absent the City's discrimination only two additional promotions would have been available, could radically restructure the City's police force by creating many more lieutenants and sergeants than the City sought fit to create under its own promotion policies. The very magnitude of this remedy risks reshaping the Police Department in a variety of ways unforseen and unintended by the district court.

We therefore vacate the award, and remand the matter to the district court. Because of the subjective nature of the City's promotion process, the district court was unable to identify two individual class members who should have received the 1992 promotions. On remand, we therefore direct the district court to award each certified officer candidate a pro rata share of the monetary value of the promotion for which they were eligible.[7]

III.

In sum, the district court's remedial award was excessive, and should have been limited to a pro rata

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[7] At oral argument, both parties conceded that the City of Firefighters' and Police Officers' Retirement Trust, who played no role in the City's discriminatory practices and who administer retirement benefits to all former City of Miami police officers, should not be responsible for the monetary value of the officers' lost pension benefits. To the extent the district court awards the thirty-five officers a pro rata share of lost pension benefits, the City, and not the Trust, shall be held liable for those monies.

division among those officers certified for the 1992 promotions. The twelve sergeant candidates should share, on a pro rata basis, the value of the sergeant promotion. Accordingly, we vacate the district court's award and remand.

VACATED IN PART AND REMANDED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CITY OF MIAMI and FRATERNAL ORDER OF POLICE, MIAMI LODGE 20,

Defendants.
_____/

CASE NO. 75-3096-CIV-KEHOE

ORDER GRANTING MOTIONS FOR *RULE TO SHOW CAUSE*

(Filed Mar. 13, 1998)

This matter came before the Court on two motions for rule to show cause relating to promotional practices in the City of Miami Police Department and the interpretation of the consent decree entered by this Court in 1977 as modified by the consent order in 1983.

Oral argument was heard by the Court on both motions on January 15, 1997. The parties have, pursuant to the Order of this Court submitted a list of undisputed facts. Based on the undisputed facts, the memorandum of law submitted and the Court being otherwise advised in the premises, the motions for rule to show cause are hereby granted for the reasons which follow:

ORDER AS TO POLICE LIEUTENANTS

In January 1993, a motion for rule to show cause was filed by Fraternal Order of Police, Miami Lodge 20 (FOP) the collective bargaining agent for all police officers in

the city of Miami holding the ranks of police officer, sergeant, lieutenant and captain. The basis of the motion is an allegation that the City had failed to abide. by the terms of the consent decree in the manner in which it promoted to the rank of police lieutenant.

The City of Miami, pursuant to Section 36 of the City Charter maintains a Civil Service system based on merit and efficiency as demonstrated by competitive testing. The Miami Civil Service Rules provide a procedure for the filling of vacancies in the Police Department and "leave to discretion as to manner in which those vacancies are to be filled." *City of Miami v. Rezeau*, 129 So.2d 432 (Fla. 3rd DCA 1961).

The Civil Service Rules call for certification of five names for the initial vacancy in any requested list of promotions. The City may certify an additional three names if necessary to fulfill the affirmative action goals of the consent decree.

The Supreme Court in the Eleventh Circuit Court of Appeal had clearly defined the parameters in which race conscious relief may be granted in employment matters. In *The City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989), the Supreme Court struck down a 30% "set aside" on minority contracts as being invalid under the Fourteenth Amendment's equal protection clause. The plan was not narrowly tailored to remedy the effects of past discrimination since it entitled a minority from anywhere in the country to receive a preference over other citizens based solely on race. Under a "strict scrutiny" standard, the Court in *Croson* held that race conscious relief demands a "compelling governmental interest" and

that. any race conscious relief must be "narrowly tailored" to achieve that interest. 488 U.S. at 498-508.

Where the use of race-conscious affirmative action is challenged, the District Court must make a factual determination that the public employer "has a strong basis in evidence for its conclusion that racial discrimination necessitates affirmative action." *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994). The court held that "special vigilance" is required against unyielding racial quotas. *Id.* at 1569. The intent of a consent decree cannot be to maintain quotas based on race. *U.S. v. City of Miami*, 2 F.3d 1497, 1506 (11th Cir. 1993).

More recently, the Supreme Court in *Adarand Constructors, Inc. v. Federico Pena*, 515 U.S. *200*, 115 S.Ct.2097 (1995) that the compelling governmental interest required under the examination of race conscious relief cannot utilize race as a basis to "make up" for past racial discrimination in the opposite direction. *See also, Hayes v. Northstate Law Enforcement Officers Association*, 10 F.3d 207 (4th Cir. 1993); *Black Firefighters Association v. City of Dallas*, 19 F.3d 992 (5th Cir. 1994).

In the present case, the dispute arises out of the City of Miami's use of a provision in its Civil Service Rules relating to the use of "selective certification." In particular, Civil Service Rule 8.7 provides in relevant part:

> "If special requirements of sex, domicile or the possession of special qualifications are properly justified, the Director of the Human Resources Department may also certify the names of not more than three persons who best meet such special requirements."

In the present case, the City certified the names of three additional black males for promotion to the rank of lieutenant solely because of their race. In a memorandum dated April 8, 1992 the Police Chief requested the certification of additional black males on the belief that additional black supervisors were necessary for "positive role models and ethnic recognition." A further request for selective certification was repeated on July 21, 1992. In a memorandum from the Chief of Police to the Human Resources Department, the request for certification of additional black candidates for the rank of lieutenant was urged based on the ability to "understand and speak" non-traditional English. Further, request was made on the basis that black lieutenants were needed in the street narcotics unit. This is the apparent basis upon which the Human Resources Department agreed to the certification of additional persons.

There is no showing in the record of any adverse impact on the promotional exam at issue. There is no showing that the black candidates who received selective certification possessed any special skills. There is no showing in the record that sex or domicile was an issue. The only apparent qualification was that these additional candidates were of a particular race. This is not a permissible basis for promotion under the consent decree.

The consent decree specifically prohibits discrimination against *any* person on the basis of race. This means that no race is to be favored over another: The City of Miami's philosophy as expressed in its use of selective certification in this case essentially creates "debtor" and

"creditor" races. This concept is [sic] specifically been disapproved by the Supreme Court. *See, Adarand, supra* at page 2108.

The duties of a police lieutenant involve the supervision of other officers. It is not a street level function, rather, it is a command position. There is no showing in the record which indicates that possession of a particular race is necessary to exercise that command function.

This case is remarkably similar to the recent decision of the United States Court of Appeals for the Fifth Circuit in *Police Association of New Orleans v. City of New Orleans*, 100 F.3d 1159 (5th Cir. 1996). In *City of New Orleans*, the Police Association and a group of non-African American officers brought an action. alleging that the City had violated the equal protection clause and the consent decree which had settled a race discrimination action by making certain transfers and promotions of only African-American officers. The United States District Court found for the Association and the officers. On appeal, the United States Court of Appeals for the Fifth Circuit found that the City's transfers and promotions of African-American officers violated the equal protection clause and that such transfers and promotions violated the decree itself. Further, the Court found that the City was liable under 42 U.S.C. § 1983 for equal protection violations. The City of New Orleans, like the City of Miami effected promotions of persons of a specific race in order to create a better reflection of racial composition of the City. The Fifth Circuit Court of Appeals found that that action fails to meet the furtherance of a compelling state interest and therefore is a denial of equal protection. The City of Miami in this case, as in the case of the City of New

Orleans, presented no specific evidence of past discrimination which was being remedied by the race conscious promotions. Further, the Court found that the consent decree which had settled a race discrimination suit against the City could not serve as a finding of past discrimination for the purposes of a compelling state interest inquiry. *Id.* at 1167-1168. Further, the Fifth Circuit Court of Appeals noted that the consent decree in New Orleans, as does the one in the present case, includes a color blind provision prohibiting unlawful discrimination. It does not matter what color the person discriminated against may be, the construction urged by the City would, eviscerate the system. *Id.* at 1169-1170. Accordingly, the Court finds that the City's action in the present case has violated the terms of the consent decree.

Having determined that the City has failed to abide by this Court's Order in the manner of its promotional practices, the Court turns to the question of a remedy. Promotion to the rank of lieutenant carries a substantial monetary value. Promotion brings with it a 15% increase in pay and an accompanying increase in the value of retirement leave and other economic benefits from the City. It is also a prerequisite for promotion to the rank of captain. In personnel matters, Civil Service regulations are to be "scrupulously observed." *Fredericks v. School Board of Monroe County*, 307 So.2d 463 (Fla. 3rd DCA 1975). Failure to follow Civil Service rules and regulations will render a governmental agency's actions void. *Bloodworth v. Suggs*, 60 So.2d 768 (Fla. 1952); *City of Hialeah v. Stolla*, 330 So.2d 825 (Fla. 3rd DCA 1976).

Promotional and professional interests of those non-hispanic whites and hispanics who were bypassed by

virtue of the City's use of selective certification have been denied the right to promotion and economic advancement. They have further had their prospective retirement benefits diminished.

The FOP has not asked that the persons selectively certified be demoted. It has asked instead that those treated unfairly be made whole. The Court agrees that this is the only appropriate remedy.

Accordingly, the Court finds that the appropriate make whole relief is warranted in order to remedy the unlawful discrimination effected by the City of Miami and to serve as a reminder that the City must, in all of its personnel policies follow the goal of the consent decree which is to create a race neutral work place. The favoring of one race, gender or ethnic group over another is unlawful, regardless of the group that is favored.

For those adversely affected who remain at the rank of sergeant, it is ordered that they shall be promoted to the rank of lieutenant retroactive to 1992 with full back-pay, seniority, and other emoluments of office. In addition each shall receive upon retirement, a lump sum of $15,000.00 to be included in pensionable compensation. For those sergeants who were promoted to the rank of lieutenant on a subsequent certification or promotional list, their seniority and pay shall be adjusted retroactively to 1992. In addition, they shall have their current pay adjusted as if they hold the rank of police captain and upon retirement shall receive a lump sum of $15,000.00 to be included as pensionable compensation. The Court further reserves jurisdiction, upon a proper showing, for an

award of attorneys' fees to Fraternal Order of Police, Miami Lodge 20.

ORDER AS TO POLICE SERGEANTS

This matter arises from a motion for rule to show cause filed by Fraternal Order of Police, Miami Lodge 20 (FOP) filed in August 1993 concerning the use of selective certification for promotion to the rank of police sergeant. The City utilized selective certification to select Gary C. Eugene, a Haitian American, for promotion to the rank of police sergeant on the basis that he was a Haitian/Creole speaker. Eugene occupied the 107th spot in numerical order on the sergeant's promotional register. The City bypassed 30 other qualified candidates including Mario J. Roman, an Hispanic male who is also fluent in Creole.

The Court finds that the City's use of selective certification is not warranted. The Court finds that the City selected Gary C. Eugene solely on the basis of his ethnicity and without regard to his language skills.

The determination that the "special qualification" of Haitian/Creole speaking was not determined until the waning days of the two year promotional register. Civil Service Rule 5.1 requires that all job announcements for the classified service set forth the qualifications necessary or desirable for the performance of the work. The parties are in agreement, that no language skill is a requirement for promotion to the rank of police sergeant. Similarly, Civil Service Rule 6.3 requires selection procedures to be practical in character and to fairly determine the relative capacity of the person examined to discharge the duties

of the particular classification. The parties are in agreement that there was no language test as part of the written promotional examination for police sergeant.

Like police lieutenants, police sergeants are supervisors. They supervise the activities of other police officers. All of that work is performed in English. The City's expressed reason for wanting a Creole speaker was to be able to better communicate with members of the Haitian community. This ability to communicate is irrelevant to the question of supervisory authority.

Under Civil Service Rule 11.2, the City could have utilized any of its Creole speaking officers in time of emergency by giving them a temporary appointment. Moreover, an officer communicating with citizens need not be a supervisor,. It is clear from the record that ethnicity and not language was the motivating factor.

As a result, the discrimination in this case extends to individuals beyond Mario J. Roman. All of the other candidates on the promotional register between Mario Roman's position at number 77 on the register and Gary Eugene's position on the register had their promotional aspirations trammeled by the City's desires for political correctness. This is inconsistent with the goals of the consent decree of creating a work place in which race, ethnicity or gender are not a barrier to promotion.

If the City wished to make foreign language a required supervisory skill, it may do so through the proper procedures established in its own Civil Service Rules. It may not utilize the consent decree in an effort to achieve political correctness.

The legal reasoning which led the Court to grant the motion with regard to lieutenants is equally applicable here. There is no showing in the record of any adverse impact which would warrant the race/ethnic conscious certification in which the City engaged.

The Court further takes note that Section 41(d) of the Miami City Charter Requires salaries and compensation in the classified service (which includes police sergeants) to be "uniform for like service" in each grade. This has been interpreted to prevent an emolument from being granted to some employees within a work class but denied to others. By attempting to utilize the consent decree to promote based on Creole proficiency, while excluding other linguistic proficiencies, the City is asking the Court to approve a violation of its own charter. *See, City of Miami v. Butcher,* 303 So.2d 378 (Fla. 3rd DCA 1974). This the Court cannot and will not do. Accordingly, for these reasons and on the basis of the Court's analysis of Federal civil rights law in the lieutenants' motion, the FOP's motion is granted.

Having determined that the FOP's motion should be granted, the question now returns to remedy. As in the case of lieutenants, the affected officers fall into two classes. Some have subsequently been promoted while others have not yet achieved that rank. For those who have yet to be promoted, the Court directs that they be promoted to the rank of sergeant with full backpay, seniority and other emoluments of office retroactive to the date of Gary Eugene's promotion. In addition they shall receive, upon retirement, the sum of $15,000.00 as pensionable compensation. For those who are already at the rank of sergeant, the Court directs that they shall

receive backpay and seniority retroactive to the date of Gary Eugene's promotion and, in recognition of the lost opportunity for promotion to the rank of lieutenant their current pay shall be adjusted as if they hold the rank of lieutenant. In addition they shall receive upon retirement the sum of $15,000.00 as pensionable compensation. The Court reserves jurisdiction, upon a proper showing, for attorneys' fees and costs payable to the FOP.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 13th day of March, 1998.

/s/ James W. Illegible
UNITED STATES DISTRICT JUDGE

cc: All counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, Plaintiff, v. THE CITY OF MIAMI, et al. Defendants.	CIVIL ACTION NO. 15-3096-CIV-JE CONSENT DECREE (Filed March 29, 1977)

The plaintiff United States of America has filed its complaint in this action against the City of Miami alleging that the defendants are engaged in a pattern and practice of discrimination in employment on the basis of race, sex and national origin, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, as amended by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261, March 24, 1972); the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3766, as amended, and the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §1221 *et seq.*

The Court has jurisdiction over the parties and the subject matter of this action.

The parties have waived hearing and the entry of findings of fact and conclusions of law on all issues covered by this Consent Decree, and have agreed to the entry of this decree which shall not constitute an adjudication or an admission by any of the defendants of any violation of law.

The plaintiff recognizes the adoption by the City Commission of the City of Miami of Resolutions No. 75-636 and 75-953 and Motion No. 75-727 as evidence of good faith efforts by the City of Miami to take affirmative action to increase minority and female participation throughout the City's work force.

It is therefore ORDERED, ADJUDGED AND DECREED as follows:

1. The defendant City of Miami, its officials, agents, employees, and all persons in active concert or participation with them in the performance of City functions (hereinafter collectively referred to as the City) are permanently enjoined and restrained from engaging in any act or practice which has the purpose or effect of unlawfully discriminating against any employee of, or any applicant or potential applicant for employment with, the City of Miami because of such individual's race, color, sex or national origin. Specifically, the City shall not fail or refuse to hire, promote, upgrade, train or assign any individual, discharge any individual or otherwise discriminate against any individual as an employee or applicant for employment with respect to compensation, terms, conditions or privileges of employment because of race, color, sex or national origin.

In no event shall the City be required to hire unnecessary personnel, to hire, transfer or promote a person who is not qualified, or to hire transfer or promote a less qualified person, in preference to a better qualified person, consistent with the provisions of this decree.

2. Recruitment

a. The City shall continue to develop and reassess its present affirmative recruitment program designed to inform blacks, Latins and women of job opportunities with the City, for the purpose of securing sufficient qualified applicants to enable the City to meet the hiring goals set forth herein. The recruitment program shall include maintaining contacts with area high schools, technical and vocational schools, colleges, and organizations which have traditionally expressed an interest in providing minority and female applicants or which indicate such interest in the future, and informing them of employment opportunities for City residents. In addition, where appropriate, advertising of employment opportunities shall be placed in radio stations and other mass media primarily directed to black, Latin and female audiences for the purpose of emphasizing to minorities and women the availability of employment positions. It is understood that the present recruiting area is the city limits of the City of Miami, and such schools, organizations and media utilized shall be consistent with this policy.

In the event it is determined by the City (by its Civil Service Board) that recruiting solely within the City of Miami fails to produce sufficient qualified applicants or is not productive of results as envisioned in this decree, the recruiting area may be enlarged to include Dade County. In the event the recruiting area is enlarged, persons on civil service registers who do not reside in the City of Miami will be considered for employment only after there are no City residents remaining on the register.

b. Police Department. The City shall operate the Law Enforcement Community Outreach and Career Program (the Tri-Cultural Program) as long as

federal grant funds continue to be made available for that purpose. The City will continue to make applications for grant funds for the Tri-Cultural Program. In the event such federal funds are discontinued the City shall develop a police officer recruiting program of a similar nature and shall submit it to the plaintiff for approval prior to its commencement, provided that approval will be assumed if no reply is received within 30 days.

c. Fire Department. The City shall continue to pursue an active program to recruit blacks, Latins, and women who meet the requirements to become firefighters. Workers in City departments shall be included in the recruiting program.

In such recruiting program the City may continue to cooperate with the International Association of Firefighters Labor Recruitment Program, and Miami Firefighters Association No. 587, if such organizations exhibit a continued willingness to engage in such cooperation.

The City, through the International Association of Firefighters Labor Recruitment Program, shall also provide assistance to applicants to prepare for both written and physical tests and for oral interviews, as well as orientation to assist applicants in the Fire College training program required for entrance of firefighters upon employment.

The City shall provide sufficient information on test content at least three months in advance of the expected examination date to enable such organizations to develop and implement an adequate training program.

The City understands that this program will supplement the normal selection process, for the period of this Decree. The City shall seek to select 30% of

new appointments from among those applicants who participated in the minority recruitment and training program, if sufficient qualified applicants are obtained by this means. This paragraph is to be consistent with those goals established for the fire department in paragraph 5 of this decree.

In the event the International Association of Firefighters recruitment program is discontinued and the Firefighters Association No. 587 is no longer able or willing to cooperate in the recruitment program for the Fire Department, the City shall develop a similar Firefighter recruitment program and shall submit it to the plaintiff with the next report required under this decree.

3. Selection Procedures

Except as otherwise provided in this decree, the City shall consider applications for employment from any person who meets the current criteria for any given position, without regard to such person's race, color, sex or national origin, provided, however, that no standards shall be applied to exclude blacks, Latins and women which are not also applied to disqualify white Anglo males. Specifically:

(a) Testing Requirements

The City shall not use any written examination for employment or promotion which has an adverse impact on blacks, Latins or women unless it can be shown to be predictive of successful job performance, or can otherwise be shown to be job related, in accordance with standards established by the Equal Employment Opportunity Commission in its *Guidelines on Employee Selection Procedures*, 29 CFR §1607 *et seq.*, except that:

(1) The City may continue to use such tests during the time they are being validated in accordance with the EEOC *Guidelines*, and the use of such tests will not be considered a defense against failure to meet the goals set forth in paragraph 5 below.

(2) The City may continue to use skill tests of actual job content (for example typing and filing).

(3) The City shall continue to provide exams in Spanish for positions which do not require proficiency in English.

(4) Nothing in this paragraph shall prevent the administration of tests on a research basis during the term of this decree, provided the results of such tests are not used in any manner in hiring, promotion or transfer decisions or in the evaluation of personnel, and the scores and/or relative performance of the persons tested are not made known to any individuals other than those directly involved in the analysis of the test.

(b) Education Requirements

The City shall continue to review job descriptions for the purpose of evaluating the need for a high school diploma or equivalency certificate, or an associate or bachelor's degree, as a general qualification for employment. The City shall discontinue the use of an education requirement for any position for which such a degree or diploma is unnecessary and where the continued use of such a standard will have the effect of disqualifying blacks, Latins or women at higher rates than white Anglo males. The results of such review shall be submitted to counsel for

plaintiff along with the first report required under this decree.

(c) Background Investigation

The background investigation shall not include, nor shall any black, Latin or woman be rejected for employment on the basis of, any inquiry which is not routinely made about white Anglo males.

(d) Personal (Pre-Employment) Interview

No personal (pre-employment) interview (including police oral review board) conducted with respect to women, blacks and Latins shall include, nor shall any woman, black or Latin be rejected for employment on the basis of, any inquiry which is not routinely made of white Anglo males.

(e) Medical Examination

The medical or physical examination required of all applicants shall be the same for all applicants, in accordance with job requirements. Whenever an applicant believes s/he has been erroneously disqualified on the basis of the medical or physical examination, s/he shall be given the opportunity to secure an additional diagnosis, at the applicant's expense, from two independent physicians agreed upon between the City and the applicant. Should the physicians agree that the applicant is qualified according to regularly established physical standards, such evidence of fitness shall entitle the applicant to be considered for employment, in the absence of any other disqualifying factor.

(f) Physiological Qualifications

The physiological qualifications applied to any position shall not include any standards which operate disproportionately to exclude blacks, Latins or women and which have not been shown to be valid or otherwise demonstrably job-related in accordance with standards established by the Equal Employment Opportunity Commission in its *Guidelines on Employee Selection Procedures,* 29 CFR 1607 *et seq.* Any test of physical agility required to be completed in order to qualify for appointment to any City position, particularly to entry level positions in the Police and Fire Departments, shall be administered to blacks, Latins and women in the same manner and under the same conditions as such tests are administered to white Anglo males.

(g) Police and Fire Departments

For purposes of the fire department the requirements of the state firefighters standards council shall apply. For purposes of the police department, the standards of the Police Standards and Training Commission of Florida shall apply. Should such state standards change or be modified in apparent disagreement with federal law, such changes shall be discussed by the parties.

(i) Criminal Record

Applicants for employment shall not be disqualified solely on the basis of an arrest record.

A record of criminal conviction may be used to reject an applicant for the position of police officer only if the applicant has been convicted of a felony or of a misdemeanor

involving "moral turpitude" as the term is defined by law or if the applicant has been released or discharged under any other than honorable conditions from any of the armed forces of the United States.

An applicant for the position of fire fighter who has been convicted of a felony may be excluded from consideration for employment for a period of four years after expiration of sentence or final release by the parole and probation commission unless the applicant, prior to the expiration of the four-year period, has received a full pardon or has had his/her civil rights restored.

The above provisions shall not be construed to prevent consideration of an arrest record with respect to the qualifications of an applicant where arrests have resulted in indictments or information against an individual and where these indictments or informations are for felonies or misdemeanors involving moral turpitude even though there is no actual conviction.

(ii) Polygraph Examination

A polygraph examination (lie detector test) may be administered only to applicants for positions requiring bonding and positions of trust or security. No questions shall be asked of black, Latin or female applicants which are not also regularly asked of white Anglo male applicants, and in no event shall an applicant be asked any questions which are not directly job-related. Under no circumstances shall the polygraph be used as the sole disqualifying factor in the screening of any applicant. The polygraph examination

shall be administered to black, Latin and female applicants on the same terms and under the same conditions as those applied to white Anglo male applicants.

(iii) Minimum Age

Any applicant who shall have reached the age of 18 shall be eligible for appointment as a firefighter or a public service aide.

(iv) Police Academy and Fire College

Training for entry level police officers and firefighters shall be administered to blacks, Latins and women on the same terms and under the same conditions as such training is administered to white Anglo males.

4. Assignment

a. The City shall not discriminate on the basis of race, sex or national origin in the assignment of employees in any department, except as may be consistent with standards established by the Equal Employment Opportunity Commission in its *Guidelines on Discrimination Because of Sex*, 29 CFR 1604 *et seq.*, and its *Guidelines on Discrimination Because of National Origin*, 29 CFR 1606 *et seq;* and by the Office of Revenue Sharing of the U.S. Department of Treasury in Section 51.54 of its Rules and Regulations, 31 CFR Part 51.

b. Sanitation Department

The City agrees to establish lines of progression within the Waste Collection Division of the Sanitation Department as follows:

A list of stand-by laborers will be established who will be offered employment on a daily basis to fill positions held by probationary or permanent waste collectors who are absent on their assigned work day.

As vacancies occur in the waste collectors classification, the department director shall select, with the assistance of the Sanitation Employees Association Committee, a replacement from the established list of stand-by laborers.

The City will train qualified waste collectors in the operator operations of the desired type of equipment utilized by waste collector I. Vacancies in the classification of waste collector operator I shall be filled by the selection of one of such trained personnel by the department director, with the assistance of the Sanitation Employees Association Committee.

The City shall offer training in the operation of the equipment utilized in the next higher classification and repeated throughout the equipment operations series.

The lines of progression following that shown above shall be:

WASTE COLLECTOR OPERATOR II
WASTE EQUIPMENT OPERATOR

The City further agrees that the classification of sanitation foreman and sanitation inspector I will be filled from existing permanent employees within the Sanitation Department in accordance with the goals established herein for blacks, Latins and women.

c. Police Department

The City shall evaluate its time in grade and performance evaluation requirements for promotion and for assignment to positions other than police officer and shall develop time in grade and performance evaluation standards which do not have the effect of selecting white Anglo males at a higher rate than blacks, Latins or women. Such selection process shall be consistent with the goals and timetables set forth in this decree for promotion. A review of this paragraph shall be made at any time upon the election of either party.

5. Goals

In order to eliminate the effects of past discriminatory practices against blacks, Latins and women the City shall adopt and seek as its long term goal the participation at all levels throughout its work force of blacks, Latins and women approximating their respective proportions in the City's labor force, as determined by the United States Bureau of the Census. The purpose of this goal is to eliminate the substantial underrepresentation and uneven distribution of blacks, Latins and women throughout the City's work force.

(a) Hiring

In order to achieve this long germ goal, subject to the availability of qualified applicants, the following recruitment and hiring goals shall be established for blacks, Latins and women (blacks and Latins are referred to collectively in this paragraph 5 as minorities). It is understood that the goals are minimums, and that the City shall seek to fulfill the goals by hiring blacks, Latins and

women generally in proportion to their representation in the labor force. Only full time regular civil service employees who have successfully completed their probationary period, or, in the case of the Police and Fire Departments, those who successfully complete the police academy or fire college, shall be counted in determining progress toward the goals. Progress toward these goals shall be measured on an annual basis.

(1) For each entry level position of police officer, public service aide, fire fighter and traditionally white Anglo male positions in the Departments of Finance and Building, the goal shall be 56% minorities and women each year. For purposes of this subparagraph, traditionally white Anglo male positions shall include such positions as building inspector, zoning inspector and skilled trades.

(2) For each traditionally black entry level service and maintenance position in the Departments of Sanitation and Public Works, the goal shall be 35% other than black each year. For purposes of this subparagraph, traditionally black entry level service and maintenance positions shall include such positions as laborers and waste collectors.

(3) For each entry level skilled craft, technical and lower level administrative position throughout the City, the goal shall be 50% minorities and women each year. For purposes of this subparagraph, skilled craft positions shall include such positions as mechanic (including automotive, air condition and heavy equipment mechanic), carpenter, electrician, lineman, machinist, painter, pipefitter, plumber and welder; technical positions shall include

such positions as engineering, identification and planning technicians; and lower level administrative positions shall include white collar non-technical positions such as administrative aid, clerk, secretary, keypunch operator.

(4) For each entry level paraprofessional position, 40% minorities. For purposes of this paragraph, paraprofessional shall include such positions as foreman, supervisor, computer programmer.

(5) For entry level professional positions, the goal shall be 30% minorities and women each year. For purposes of this paragraph, professional shall include such positions as accountant, engineer, manager, architect, publicity writer.

(6) For entry level official and upper level administrative positions, the goal shall be 20% minorities and women each year.

(b) Promotion

Subject to the availability of qualified applicants, promotional goals shall be established for minorities, on a department basis, with each department having as its yearly goal, until the long term goal has been met for a period of one year, either parity with the Miami City workforce population statistics or the percentage of minorities currently employed in the department, which ever is smaller. Priority opportunity for promotion (as defined in paragraph 7(b) below) within a particular department shall be provided to qualified persons who have indicated a desire or interest in the promotion, transfer and assignment opportunities created by this decree. Each person responding to this request shall be

promoted or transferred pursuant to the provisions of paragraph 7 below.

6. Affected Class

The term "affected class", as used in this decree, shall include the following:

(a) All incumbent black and Latin employees currently holding positions with the City who were initially assigned to traditionally black or Latin jobs.

(b) All incumbent women employees currently holding positions with the City who were initially assigned to traditionally female jobs.

(c) All blacks, Latins and women identified as having been discriminatory denied employment opportunities (including promotion and terms and conditions of employment), or terminated since March 24, 1972.

7. Promotion and/or Transfer Pool

(a) The City shall compute the seniority of each member of the affected class interested in this provision based on the total seniority of that person with the City. The City shall maintain a list of people signing up under the provisions of this paragraph 7.

(b) A member of the affected class shall be given the initial opportunity to fill any vacancy in the City where the person is the senior applicant who meets, or could reasonably be expected to meet after an initial probationary period, the minimum qualifications for the position unless a applicant not a member of the affected class has demonstrably superior qualifications. This preference shall be exercised at the written election of the applicant.

An affected class member using this preference who successfully completes the probationary period shall at that time be informed that s/he can remain in that position or return to his/her prior position.

(c) If no affected class member seeks or is entitled to a vacancy as provided in (b) above, the vacancy shall be filled pursuant to the procedures and goals for hiring set forth in this decree.

(d) All members of the affected class shall be notified of the provisions of this decree and specifically of the opportunity to transfer and/or be promoted to other positions either within the same department or in other departments when such vacancies occur and notices to fill them are posted by the Civil Service Board. At least ten (10) days before any such vacancies are to be filled, notices of the vacancies shall be posted at convenient locations in each department or division where members of the affected class are employed. Unclassified positions are exempt from this requirement.

(e) No member of the affected class who makes a lateral or downward transfer for the purpose of enhancing promotional opportunities, shall be paid at a lower rate than the rate for the job from which she transferred, including any regular within grade increments s/he would have received had s/he remained on that job. A person utilizing rate retention pursuant to this paragraph who returns or is returned to her/his original job pursuant to subparagraph (b) above, may utilize the right to rate retention on a subsequent transfer, provided, however, that this right to rate retention may not be exercised on more than three occasions. The right to rate retention

shall continue until a transferee has reached that level in the new department or line of progression where the rate of pay is equal to or higher than that in the previously held job classification. A transferree shall lose this privilege of rate retention if s/he refuses a promotion in the new line of progression or fails to bid on a higher rate job in the new department for which s/he is eligible.

(f) Rights of a member of the affected class under paragraph 7 are limited to (1) one successful promotion or transfer, or (2) three unsuccessful attempts to promote or transfer.

8. Specific Relief

(a) The City shall establish a fund in an amount sufficient to cover its back pay liability under this Decree. The dollar amount, identification of recipients, and terms for acceptance of back pay for affected class members shall be consistent with the provisions of this Decree and shall be determined by negotiations with the United States and the City.

(b) Certain persons identified in Paragraph 6 (c) of this Decree have charges currently pending before the EEOC which were filed before the entry of this Decree and which allege employment discrimination by the City of Miami.

The United States and the City will make a good faith effort to resolve the aforementioned charges within the framework of this Decree.

In situations where agreement is reached concerning entitlement to specific relief for any of the aforementioned persons, the names of the persons and the specific

relief agreed upon for each shall be submitted to the Court within an appropriate period.

In cases of disagreement between the United States and the City concerning resolution of the aforesaid charges, either party may apply to the Court for a resolution of the matter at issue.

(c) Nothing in this Decree will be construed as limiting the rights of any individual as provided by Section 706 of Title VII, 42 US Code, Section 2000e-5.

(d) Each person entitled to receive back pay or other specific relief pursuant to this Decree shall be offered such back pay or other relief conditioned upon execution of an agreement releasing the City from further liability for relief based on matters covered by this Decree occurring before its effective date. No back pay pursuant to this Decree shall be awarded for promotions or transfers made more than five (5) years after the effective date of this Decree. No person shall be entitled to receive back pay more than once.

9. Record Keeping

The City shall retain during the period of this Decree necessary records to support the implementation of this Decree. These records shall be made available to the Department of Justice for inspection and copying upon written request.

The City will maintain the following records:

(a) A list of all organizations and schools which are contacted pursuant to Paragraph 2, showing the date that any notice of job opportunity was mailed to them, the position and number of positions to be filled from that

notice, and the date through which applications could be received for the job which was advertised, including a summary or compilation of all other recruitment efforts aimed at minorities and women, together with the date of said efforts and the names and positions of defendant's employee who made the contact and the nature of the contact.

(b) All written applications and related records for all persons seeking employment with the City, including applications for transfer within or among departments, for a period of three (3) years, and shall include on such applications identifications of the applicant by race, sex and national origin.

(c) Pass/fail results by race, national origin and sex for all selection standards administered by the City, except those excluded in paragraph 3(a) of this Decree.

(d) All written communications between the City and applicants for both initial entrance, transfer and promotion.

(e) Sufficient records on part-time, temporary and seasonal employee to assure accurate and complete reports for these employees as required in paragraph 10(h).

10. Reporting

Within ninety (90) days after the entry of the Decree, and following June 30 and December 31 of each subsequent year during the term of this Decree, the City shall report to the Attorney General [to the attention of Chief, Employment Section, Department of Justice, Washington, D.C. 20530 and of the Compliance Manager, Compliance

Division, Office of Revenue Sharing, Department of the Treasury, Washington, D.C. 20226] the following inform:

(a) A summary showing the total number of employees by race, sex and national origin in each job classification of the City.

(b) The list of members of the promotion pool by department required by paragraph 7(a) of this decree.

(c) A report showing the positions for which persons in the affected class have applied, name of the person, the dates of such applications and whether or not such applications were successful. The report should also show any position which the persons in the affected class have been offered but which they refused, showing both the job offered and the dates thereof.

(d) A list of all newly hired employees indicating the name, race, sex, national origin and job classification of each since the last report was filed.

(e) A list of all person, by job classification, to whom promotion has been offered under paragraph 7(b) of this Decree and whether or not that promotion has been accepted.

(f) A list of all promotions, name, race, sex, national origin and date of hire of the employee promoted and the date of the promotion.

(g) A breakdown of the applicant flow of the City by race, sex and national origin which indicates the number of applicants by race, sex and national origin hired, rejected and pending

for each job classification. A person is considered an applicant for this purpose upon filing a formal application when a job is posted and upon meeting the minimum qualifications for the position.

(h) Pass/fail results by race, national origin and sex for all selection standards administered by the City, except those excluded in paragraph (3)a of this decree.

(i) A list of part-time employees, to include race, sex, national origin and job classification and term of employment.

11. EEO Officer

Copies of this Decree shall be provided by the Plaintiff to be posted in conspicuous locations within each Department and/or operational unit of City Department. Further, the City shall appoint an EEO officer for the City whose duties shall include:

(a) To advise black, Latin and female employees of the terms of this Decree.

(b) To receive and investigate complaints of race, sex and national origin discrimination; and to conciliate when appropriate; and

(c) To maintain a complete record of all actions taken in pursuit of the duties outlined above, including all correspondence directed to the defendant and/or any investigatory files. The individual appointed as EEO officer shall have his office hours and location posted conspicuously beside the Consent Decree.

12. Definitions. For purposes of this decree, the following terms shall have the meanings set forth below.

a. Assignment shall include the initial appointment of an employee to a particular department or job classification and the duties and responsibilities of an employee in a job classification.

b. Black shall include males only.

c. Effective date shall mean the date of entry of this decree.

d. Honorable conditions shall mean honorable and general discharges.

e. Latin shall mean males of Cuban, Puerto Rican, Mexican or other Latin American origin.

f. Promotion shall mean the elevation of an employee to the next job classification in a given job ladder or line of progression.

g. Transfer shall mean the lateral movement of an employee from one line of progression to another, either within one department or among departments.

h. Women shall include all females, regardless of race or national origin.

13. Jurisdiction

The Court retains jurisdiction of this action for such further orders as may be appropriate. At any time after five years subsequent to the date of the entry of this Consent Order, the City may move the Court upon 45 days notice to the plaintiff for dissolution of this decree, and in considering whether the decree should be dissolved, the Court will take into account whether the City

has substantially complied with this decree and whether the basic objectives of the decree have been achieved.

Dated Mar. 29, 1977.

/s/ Joe Eaton
UNITED STATES DISTRICT JUDGE

By Consent:

/s/ Illegible

/s/ Illegible
On behalf of the United States

/s/ John Illegible
On behalf of the City of Miami

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, Plaintiff,	:	CASE NO. 75-3096-CIV-JWK
v.	:	
CITY OF MIAMI, FLORIDA, et al. and FRATERNAL ORDER OF POLICE, CITY OF MIAMI LODGE 20 and WALTER A. RODAK, President Defendants.	:	CASE NO. 79-2183-CIV-JWK

CONSENT ORDER

This suit was brought by the United States of American against the City of Miami, and its officials (hereafter the City of Miami), alleging a pattern and practice of employment practices which discriminate on the basis of race, sex and national origin, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et. seq. Omnibus Crime Control and Safe Streets Act as amended, 42 U.S.C. 3766 and the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. §122 et. seq. The Fraternal Order of Police, City of Miami Lodge 20, and its President (the "FOP") and the Miami Police Benevolent Association (the "PBA") were also named as

defendants appropriate for purposes of relief, pursuant to Rule 19 and 20, Fed. R. Civ. P.

On March 29, 1977, this Court entered [illegible] the objection of the FOP and PBA, a Consent Decree, which had been agreed to by the United States and by the City of Miami. The FOP and the PBA then prosecuted an appeal to the United States Court of Appeals for the Fifth Circuit, which resulted in a decision (664 F.2d 435) and mandate which affirmed the lawfulness of the entry of the Consent Decree in all aspects save those provisions which modified the promotion practices of the City of Miami within the Police Department; and remanded for trial or other proceedings to determine how to resolve the disagreements between the parties concerning the promotion practices of the City of Miami within its Police Department. Pursuant to the mandate of the Court of Appeals for the Fifth Circuit, the Miami Police Benevolent Association, previously a party defendant, was dismissed from this action by order entered on March 12, 1982.

This Court has jurisdiction over the parties and over the subject matter of this action.

The parties to this case who have an interest in the promotion practices of the Police Department of the City of Miami, namely the United States, the City of Miami and the Fraternal Order of Police, have found that they agree on the objectives and purposes of the Consent Decree. They have therefore waived hearing and the entry of findings of fact and conclusions of law on all unresolved issues, and have agreed to the entry of this Order, pursuant to the decision and mandate of the United States Court of Appeals for the Fifth District.

Pursuant to the Agreement of the parties and the mandate of the Court of Appeals.

IT IS ORDERED:

1. The Consent Decree entered by the Court on March 29, 1977, remains in full force and effect. The provision of the Consent Decree pertaining to promotions in the Police Department and hereby reentered by consent of the United States, the City of Miami, and the FOP; and shall have the same force and effect as the other provisions of the decree, except as specifically provided below.

The only Black, Latin or female employees who were initially assigned to traditionally Black, Latin or female positions, or who were otherwise discriminatorally denied employment opportunities in the Police Department, and are the only remaining members of the "affected class" within the meaning of he Consent Decree who have not previously received transfer or promotion pursuant to paragraph 7 of the Consent Decree, are Officers Ruben Thompson and Willard Myles, and Sergeants Thomas Marshall and Alexander Sampson. Officers Thompson and Myles shall be offered priority consideration for promotion to the position of Sergeant, and Sergeants Marshall and Sampson shall be offered priority consideration for promotion to the position of Lieutenant pursuant to paragraph 7 of the Consent Decree, within twelve (12) months of the date of entry of this order. Once these remaining members of the affected class have been promoted, the provisions of paragraph 7 of the Consent Decree shall no longer apply to the Police Department.

3. The parties recognize that [illegible] equal employment opportunity law prohibits the use of selection procedures which have a discriminatory impact on the employment opportunities of Black, Latin and female candidates for promotion, unless these procedures have been validated as predictive of successful job performance. The City shall select and promote persons within the City of Miami Police Department in a fair and non-discriminatory manner from amongst qualified applicants. It is the expectation of all the parties that such non-discriminatory promotion procedures will result annually in the selection and promotion of qualified Black, Latin and female applicants in numbers approximating the proportion of qualified applications available for promotion from each such group. Nothing in this order shall obligate the City to promote any person who is not qualified or to promote a less qualified person in preference to a better qualified person.

4. The City of Miami agrees to review and if necessary to revise the selection processes for promotion to the positions of lieutenant and captain in the Police Department to assure fairness and non-discrimination in selection, as well as the accomplishment of the purposes of the Consent Decree.

5. The United States accepts the reentry of the provisions of the Consent Decree concerning the promotion practices of the Police Department and the entry of this order in settlement of the claims in the Complaint in this case against the City of Miami and the FOP concerning the promotional practices in the Police Department. The FOP accepts this order in resolution of all claims it has

against the City of Miami concerning the prior promotional practices of the City of Miami [illegible] implementation of the Consent Decree in the Police Department, [illegible], but not limited to, the adoption and implementation of Ordinance No. 8977, and including its claims before the Court in Case No. 79-2183-Civ-JWK.

6. The consent Decree as reentered shall continue in full force and effect, with respect to the Police Department, until September 29, 1984. On or after that date, any party hereto may move the Court, upon 45 days notice to the other parties, for dissolution of those provisions of the Decree which pertain to employment in the Police Department, and in considering whether the Decree should be dissolved, the Court will take into account whether the City has substantially complied with this Decree and whether the basic objectives of the Decree have been achieved.

DATED this 4th day of April, 1983.

/s/ James W. Kehoe
UNITED STATES DISTRICT JUDGE

By Consent:

/s/ Illegible
On behalf of the United States of America

/s/ Illegible
On behalf of the City of Miami and its officials

/s/ Robert D. Klausner
On behalf of the Fraternal
Order of Police
Miami Lodge 20, and Walter
A. Rodak, its president

/s/ Harold C. Culmer by
Angela Culmer
On behalf of the Miami
Community Police
Benevolent Association,
Amicus Curiae

/s/ Maria L. Illegible
On behalf of the Miami
Hispanic Police American
Confederation, Inc.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-4626

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

CITY OF MIAMI,

Defendant-Appellant,

FRATERNAL ORDER OF POLICE
LODGE #20,

Defendant-Appellee,

PROFESSIONAL FIREFIGHTERS OF MIAMI,
LOCAL 587, INTERNATIONAL,

BOARD OF TRUSTEES OF THE CITY OF MIAMI
FIRE FIGHTERS AND POLICE OFFICERS'
RETIREMENT TRUST,

Internevor-Appellants.

(Filed Feb. 11, 2000)

On Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

Before: ANDERSON, Chief Judge, MARCUS, Circuit Judge, and MILLS*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

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*Honorable Richard Mills, Senior U.S. District Judge for the Central District of Illinois, sitting by designation.

Miami City Charter

Sec. 36. Civil service.

(a) *Creation of board; appointment; terms of office; vacancies; rules and regulations.* A civil service board of the city is hereby created and established. There shall be five members constituting the said civil service board. Three shall be appointed by the commission, and two shall be elected by the employees of the city with civil service status, from said employees with such civil service status. The two so elected shall become members of the board when confirmed by the city commission. All members of the said civil service board shall serve for two years, and they shall take office as soon as appointed and qualified. The commission may remove any member of the board for cause, upon stating in writing the reasons for the removal, after allowing him or her to be heard by the commission in his or her own defense. Any vacancy shall be filled by the commission for the unexpired term. The city manager shall be authorized to prescribe the rules, regulations, and procedure for the holding of election for the purpose of electing the two members of the civil service board by the city employees with civil service status.

(b) *Chairperson; examiner; subordinates.* Immediately after appointment, the board shall organize by electing one of its members chairperson. The board shall appoint a chief examiner who shall be a member of the board and who shall also act as secretary. The board may appoint such other subordinates as may by appropriation be provided for.

(c) *Unclassified and classified service.* The civil service of the city is hereby divided into the unclassified and the classified service.

(1) The unclassified service shall include:

(A) The city manager, his assistants, and secretarial staff;

(B) The heads of departments, members of appointive boards, judges of the city court, the city clerk, chief of police, chief of fire division, and the superintendent of communications division;

(C) Assistants to department heads:

Assistant chiefs of the police division;

All ranks in the police division above the classified position of police captain;

Assistant chiefs of the fire division;

Chief of fire prevention;

Director of training in the fire division;

Battalion chiefs;

Chief of fire rescue;

Assistant to the superintendent of the division of communications;

Director of corrections.

(D) All attorneys employed by the city. The city attorney shall be the supervisor of all attorneys employed by the city. The city attorney shall have exclusive authority regarding, but not limited to appointment,

removal and salary as to assistant city attorneys. The foregoing provisions of subsection (D) shall not apply to those attorneys in the classified service of the city on November 1, 1972.

Attorneys with permanent civil service rights appointed by the city attorney to any applicable unclassified position above, shall retain civil service rights in the position from which selected as may have accrued. Personnel with permanent civil service rights appointed by the city manager to unclassified positions shall retain said civil [service] rights in the position from which selected as may have accrued.

(2) The classified services shall include all positions not specifically included by this charter in the unclassified service. There shall be in the classified service three classes, to be known as the competitive class, noncompetitive class, and labor class.

(A) The competitive class shall include all positions and employment for which it is practicable to determine the merit and fitness of applicants by competitive examinations.

(B) The noncompetitive class shall consist of all positions requiring peculiar and exceptional qualifications of a scientific, managerial, professional, or educational character, as may be determined by the rules of the board.

(C) The labor class shall include ordinary unskilled labor. (Laws of Fla., ch. 24694(1947); Laws of Fla., ch.

31001(1955); Char. Amend. No. 2, 12-1-63; Char. Amend. No. 2, 1972, 10-7-72; Char. Amend. No. 1, 12-1-74; Char. Amend. No. 3, 12-1-74; Char. Amend. No. 1, 11-4-75)

(d) *Rules; examinations; eligible lists; certiftcation of vacancies.* Subject to the approval of the commission, the board shall adopt, amend, and enforce a code of rules and regulations which shall have the force and effect of law providing for appointment and employment in all positions in the classified service, based on merit, efficiency, character, and industry; shall make investigations concerning the enforcement and effect of this article and of the rules adopted; and shall make an annual report to the commission. The chief examiner shall provide examinations in accordance with regulations of the board and maintain lists of eligibles of each class of the services of those meeting the requirements of said regulations. Positions in the classified service shall be filled from such eligible lists upon requisition from and after consultation with the city manager. When positions are filled, the employment officer shall so certify, by proper and prescribed form, to the director of finance and to the director of the department in which the vacancy exists.

(e) *Promotion.* The board shall provide uniform rules for promotion to all positions in the classified service.

(f) *Power of suspension, removal, fine, or demotion.*

(1) Any officer or employee in the classified service may be, removed, suspended, fined, laid off, or demoted by the city manager or by the head of the department in which

such person is employed, for any cause which will promote the efficiency of the service; but such person must be furnished with a written statement of the reasons therefor within five days from the date of the removal, suspension, fine, layoff, or demotion, and be allowed a reasonable time for answering such reasons in writing, which answer shall be made a part of the records of the board, with the suspension to take effect as of the date that such written statement is furnished. No trial or examination of witnesses shall be required except in the discretion of the city manager or the head of the department. Any employee in the classified service who deems that he or she has been suspended, removed, fined, laid off, or demoted without just cause may, within 15 days of such action, request in writing a hearing before the civil service board to determine the reasonableness of the action. The board shall, within 30 days after appeal of the employee disciplined, proceed to hear such appeal. After hearing and considering the evidence for and against the employee, the board shall report in writing to the city manager its findings and recommendations. The city manager shall then sustain, reverse, or modify the action of the department director. Any member of the civil service board and the director of personnel may administer an oath to witnesses appearing before said board or before said director in an investigation, disciplinary or appeal proceedings,

and they shall have the power to issue witness subpoenas and to compel the attendance of witnesses.

(2) The civil service board shall also have the right to remove or demote any official or employee in the classified service upon written charges of misconduct made by any citizen, but only after reasonable notice to the officer or employee and after a full hearing. It shall also be the duty of the board to fix a minimum standard of conduct and efficiency for each grade in the service. Whenever it appears from the reports of efficiency made to said board for a period of six months that the conduct or efficiency of any employee has fallen below such minimum standard, that employee shall be called before the board to show cause why he or she should not be disciplined. If upon hearing no reason is shown satisfactory to the board, the employee shall be removed, suspended, or demoted, as the board may determine.

(g) *Present employees.* All persons in the employ of the city holding positions in the classified service, as established by this charter, at the time it takes effect, shall, unless their position is abolished, retain same until discharged, demoted, promoted, or transferred, in accordance herewith.

(h) *Certificate of board on payroll account necessary before payment of classified service member.* The treasurer or other public disbursing officer shall not pay any salary or compensation for service to any person holding a position in the classified service unless the payroll or account

for such salary or compensation bears the certificate of the board, by its secretary, that the persons named therein have been appointed or employed and are performing service in accordance with the provisions of this charter and of the rules established thereunder.

(i) *Investigations and hearings.* In any investigation conducted by the board, it shall have the power to subpoena and require the attendance of witnesses and the production thereby of books and papers pertinent to the investigation and to administer oaths to such witnesses.

(j) *No discrimination in classified service.* No person in the classified service or seeking admission thereto shall be appointed, demoted, removed, or in any way favored or discriminated against because of political opinions or affiliations. No person holding a position in the classified service shall take part in political management or affairs or in political campaigns during city working hours or with personal property belonging to the city.

(k) *Penalties.* The civil service board, subject to the approval of the commission, shall determine the penalties for the violation of the civil service provisions of this charter.

(l) *Salaries of board and employees.* The salaries of the civil service board and its employees shall be determined by the commission, and a sufficient sum shall be appropriated each year to carry out the civil service provisions of this charter.

Sec. 40-85. Eligible registers.

(a) *Establishment.* The director of the personnel management department shall establish and maintain such promotional and open registers for the various classes or positions as he/she deems necessary or desirable to meet the needs of the service.

(b) *Order of names.* Names of eligibles shall be placed on competitive registers in the order of their final earned rating. In case of ties in the final ratings, names shall be placed on the registers in alphabetical order; when one such eligible candidate is certified, all such eligible candidates with tied scores shall be certified for interviews. Names of eligibles shall be placed on noncompetitive registers as determined by the director of the personnel management department. In the case of open continuous or intermittent recruitment, names of eligibles shall be added to competitive registers in accordance with their scores and to noncompetitive registers as determined by the director of the personnel management department.

(c) *Duration.* The term of eligibility of each register and of the names appearing thereon shall be fixed by the director of the personnel management department at not less than one year nor more than two years. Whenever, for economic purposes, the city manager by memorandum delays the filling of a promotional vacancy, the life of the subject register and all other promotional registers affected thereby shall be extended for a period of time equal to that time occasioned by the delay. Any register that has been in effect for more than one year may be

abolished or extended at any time by the director of the personnel management department. For the purpose of this rule, the life of an eligible register begins on the date the eligible register is established.

(d) *Changes in availability of eligibles.* It shall be the responsibility of eligibles to notify the director of the personnel management department in writing of any change of address or other change affecting availability for employment.

(e) *Removal of names.* The names of any person appearing on a register may be removed by the director of the personnel management department if the eligible requests in writing that his/her name be removed or if he/she cannot be located by postal authorities or other means of ordinary, communication within five days following the date of notification. The name of any eligible may also be removed if the name has been certified for appointment three separate times and has not been appointed, or if the eligible has waived appointment twice in the same class of position. Any cause specified in these rules for the rejection of applications may likewise be cause for the removal of the name of an eligible from the register on which it appears.

(Ord. No. 8977, § 2 (rule 7 (7.1-7.5)), 7-24-79; Ord. No. 10163, § 1, 10-7-86; Code 1980, § 40-60)

Sec. 40-86. Vacancies to be filled by appointments from eligible registers.

Except as otherwise provided in this article, every vacancy in the classified service shall be filled by appointment from the appropriate eligible register.

Appointments shall be made to, or employment shall be given in, all positions in the classified service by selection of persons certified by the director of the personnel management department.

(Ord. No. 8977, § 2 (rule 8 (8.1)), 7-24-79; Code 1980, § 40-61)

Sec. 40-87. Request for certification of eligibles for appointments (requisition).

Whenever the city manager shall request certification from the director of the personnel management department for appointment to, or employment in, any position in the classified service, he/she shall specify the title and duties for such position, so that certification may be made from the appropriate eligible register, or, when necessary, a proper eligible register may be prepared as the result of an examination held for that purpose.

(Ord. No. 8977, § 2 (rule 8 (8.2)), 7-24-79; Code 1980, § 40-62)

Sec. 40-88. Manner of certification of eligibles for appointment.

(a) *From open competitive registers.*

(1) *For positions other than police officer.* The director of the personnel management department shall certify from the appropriate eligible register the five persons who stand the highest thereon. Eligibles not selected shall be returned to the register in accordance with their relative grades. Only under unusual and exceptional conditions

satisfactory to the board shall the names of eligibles be passed over.

(2) *For position of police officer.* The director of the personnel management department, as soon as practicable, shall certify from the police officer eligible register at least 25 percent of the register (not to exceed 50 eligibles at any time) who stand highest thereon, giving their names, addresses and examination grades. Selection shall be made for appointment from the eligibles thus referred, and additional eligibles shall be referred, as necessary.

(b) *From promotional competitive registers.* The director of the personnel management department shall certify from the appropriate register for each vacancy the names of the five persons who stand highest thereon. Only under unusual conditions, satisfactory to the board, shall the names of eligibles be passed over.

(c) *From noncompetitive registers.* The director of the personnel management department shall certify a list of candidates which may be limited to those whom he/she deems most qualified.

(d) *From labor registers.* The director of the personnel management department shall certify from an established eligible register a list of candidates which may be limited to those he/she deems most qualified.

(e) *Additional certification.* In addition to the names certified as provided above, the director of the personnel management department shall certify from the same or another appropriate list the names of the three persons standing next highest as follows:

(1) Three members of the affected class as prescribed in the consent decree, United States v. City of Miami, case no. 75-3096-CIV-JE, S.D. Fla.,* or

(2) Three members of appropriate protected groups as defined in federal regulations, when such additional certification will assist the city in meeting hiring or promotional goals established in the aforesaid consent decree or in an affirmative action plan established in accordance with federal laws, regulations or other requirements or when an examination has adverse impact upon members of protected groups. When more than one vacancy exists, the director of the personnel management department shall certify the next name on the register and the next member of the affected class or protected group, as appropriate. If special requirements of sex, domicile or the possession of special qualifications are properly justified, the director of the personnel management department may also certify the names of not more than three persons who best meet such special requirements. When there are insufficient names on the register or other appropriate list to certify the number prescribed above, the director of the personnel management department may require appointment from among the names remaining or may establish a new register in order to meet the objectives of the city's merit system and the

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***Editor's note** – The consent decree referred to herein was entered Feb. 18, 1976, vacated April 2, 1976, and reentered as modified March 31, 1977. On appeal to the United States Court of Appeals for the Fifth Circuit, the modified consent decree was affirmed in United States v. City of Miami 614 F2d 1322.

applicable requirements of the aforesaid consent decree and other federal requirements.

The categorization of persons on the basis of race, color or national origin with respect to their identification for certification for employment or promotion under this section must be established at the time of application. The ethnic category marked on the application form at the close of recruitment must remain in force for the duration of the register.

(Ord. No. 8977, § 2 (rule 8 (8.3-8.7)), 7-24-79; Ord. No. 10282, § 1, 6-11-87; Code 1980, § 40-83)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CITY OF MIAMI and FRATERNAL ORDER OF POLICE, MIAMI LODGE 20,

Defendants.
_____/

CASE NO. 75-3096-CIV-KEHOE

JOINT STATEMENT OF UNDISPUTED FACTS

The parties hereby stipulate that the facts set forth in this Joint Statement of Undisputed Facts are undisputed. The parties do not stipulate to the relevancy of any of the facts or to the weight which any fact should be given.

THE FOP'S STATEMENT OF UNDISPUTED FACTS AS TO LIEUTENANTS

(Filed Mar. 14, 1997)

1. On March 24, 1992 a promotional register for the rank of lieutenant of police was posted by the Director of the Department of Personnel Management.

2. On April 8, 1992 Police Chief Calvin Ross requested a certification list to fill 16 police vacancies.

3. On April 8, 1992 Calvin Ross issued a memorandum to Angela Bellamy requesting the certification of additional black candidates for various reasons set forth in the memorandum.

4. On May 18, 1992 Personnel Management Director Bellamy directed that a portion of the promotional exam be re-administered due to errors in the initial examination. The new exam was given on May 28, 1992 and June 1, 1992.

5. On June 19, 1992 a new eligible register was issued.

6. On July 21, 1992 Police Chief Ross again requested certification to fill 16 police lieutenant vacancies including in that request the certification of additional names of black candidates. Ross cited different reasons in his July 21, 1992 memorandum to justify the additional certification.

7. On July 23, 1992 Personnel Management Director Bellamy approved selective certification "based on need for blacks in narcotics investigation."

8. On September 25, 1992 promotions were made to the rank of police lieutenant. Four non-hispanic white males, 2 females, 6 hispanic males and 4 black males were promoted.

9. Utilizing the "rule of 8" set forth in Civil Service Rule 8, 8 names were certified for the first vacancy and 2 names certified for each succeeding vacancy. For 16 vacancies this would have meant no more than 38 persons. The City promoted number 46 on the register, a black male, who would not have been eligible for certification and therefore unavailable to be considered for promotion, but for the use of selective certification.

10. The FOP and the City differ on the proper means of calculating the number of people who should

have been certified but all parties agree that number 46 would not have been certified if selective certification of black males had not been utilized.

11. A person promoted to the rank of lieutenant receives 10% more pay than a sergeant of comparable seniority for the first year following promotion and 15% more than a sergeant for each year thereafter.

12. Seniority in promotion is utilized to determine eligibility for days off, shift assignment and vacation.

13. Benefits under the City of Miami's Police and Fire Retirement System is based on the size of an employee's salary. As the Plan provides for a defined percentage of salary multiplied by the number of years of service, the larger the salary, the larger the pension.

14. Race is not listed as a criterion for promotion in either the Civil Service Rules or the job announcement for police lieutenant.

15. Police lieutenants may be assigned to any division in the Police Department.

16. At various times, the street narcotics unit has been commanded by an hispanic, a non-hispanic white male and an African American male.

THE CITY OF MIAMI'S STATEMENT OF UNDISPUTED FACTS AS TO LIEUTENANTS

1. On June 1, 1992, after administering and scoring a Civil Service examination for the position of police lieutenant, the Director of the City's Human Resources

Department established an eligible register containing the names of candidates who passed the examination.

2. Thereafter, on July 21, 1992, the police chief requested the Human Resources Director to issue a certification list to fill 16 police lieutenant vacancies.

3. In his request for a certification list, the Police Chief requested that "the names of additional black candidates be certified . . . in accordance with the selective certification procedure in Civil Service Rule 8.7."

4. The Police Chief's request for the application of selective certification was contained in a two-page memorandum (dated July 21, 1992) that stated, among other things:

> There is also a need to have Black commanders involved in the department's war against drugs. The department has two levels of narcotics investigations, high level (under the Vice Control Unit of the Special Investigations Section), and mid level and street level (under the Task Force Unit of the Field Operations Division). The lieutenants in those two functions are required to be on the scene of surveillance, stakeouts, drug stings and drug busts. They must make command level decisions from the street on numerous occasions, and therefore, they must blend in the neighborhood in which the action is occurring. Many of our drug investigations, especially those of crack cocaine, occur in primarily Black or mixed Black/Hispanic neighborhoods.
>
> Please consider these special qualifications in granting our request. Your consideration is appreciated in providing the Police Department

with the necessary tools to operate in a more efficient and responsible manner.

5. On July 23, 1992, the Human Resources Director approved the Police Chief's request for selective certification adopting the aforementioned statement from the Police Chief's July 21, 1992 memorandum as justification for the procedure.

6. A certification list is a list of names certified to a department director – in this case the Police Chief – for consideration for promotion into a vacant position after a Civil Service examination for the position has been administered and scored and an eligible register has been established by the Director of the Human Resources Department. All names on a certification list are taken from the eligible register and include only the names of examinees who passed the examination.

FOP'S UNDISPUTED FACTS AS TO SERGEANTS

1. On November 27, 1990, a promotional register for the rank of police sergeant was posted by the Director of Personnel Management.

2. On November 25, 1992, Chief Calvin Ross requested selective certification pursuant to Civil Service Rule 8.7 for a Haitian/Creole speaking individual.

3. Promotion to the rank of police sergeant carries no special requirements of sex, domicile or special qualifications other than the successful completion of the promotional examination and actual service in the rank of police officer for at least 36 months with a high school

degree, 32 months with an associate degree, 28 months with a bachelor's degree, or 24 months with a master's, doctorate, or law degree.

4. On November 15, 1991, the police department received a promotional register including Gary Eugene, who was selectively certified on the basis of his Haitian ancestry. Eugene was not selected at that time. On November 25, 1992, another certification list was received by the Police Department containing the names of Mario Roman and Gary Eugene as being selectively certified. Eugene was chosen for the position of sergeant.

5. At the time of his selection, Eugene occupied position 107 on the promotional register out of 114 names. Roman occupied position 77.

6. Had selective certification not been used Gary Eugene would not have been eligible for certification and therefore unavailable for promotion, based upon the number of vacancies filled and his score on the promotional exam.

7. Race is not a qualification for police sergeant.

8. No foreign language skills are required for police sergeant. Gary Eugene stated that he was qualified in foreign language skills of Creole and French. Mario Roman stated that he was qualified in foreign language skills for Creole and Spanish.

9. Promotion to the rank of police sergeant receives ten (10%) percent more pay than a police officer of comparable seniority for the first year following promotion and fifteen (15%) percent more than a police officer for each year thereafter.

10. Seniority in promotion is utilized to determine eligibility for days off, shift assignment and vacation.

11. Benefits under the City of Miami's Fire Fighters and Police Officers' Retirement System are based on the size of an employee's salary. As the plan provides for a defined percentage of salary multiplied by the number of years of service, the larger the salary the larger the pension.

12. Police sergeants may be assigned to any division in the Department.

THE CITY OF MIAMI'S STATEMENT OF UNDISPUTED FACTS AS TO SERGEANTS

1. On October 20, 1990, the City of Miami administered an examination to police officers for promotion to the rank of sergeant and, thereafter, established an eligible register on November 27, 1990.

2. On November 25, 1992, the Chief of Police, by memorandum, requested the Department of Personnel Management to provide him with a certification list to fill five vacancies in the rank of police sergeant.

3. The Chief of Police, pursuant to Section 8.7, also requested the "selective certification" of Haitian/Creole-speaking individuals.

4. In accordance with the Chief's request and with Section 8.7 of the Rules, a certification list was provided to the Police Department on that same date, November 25, 1992.

5. An examination of the November 25, 1992 alphabetical certification list shows that "selective certification" was used to certify the names of the following *two* Haitian/Creole-speaking individuals: (1) Gary C. Eugene; and (2) Mario Roman.

6. Prior to sitting for the October 20, 1990 sergeant's examination, all examinees, including Eugene and Roman were required to fill out an application for the position of sergeant.

7. At the bottom of page 4 of the sergeant's application, both Eugene and Roman, by their signatures, certified, under penalty of dismissal, that all statements in the applications were true and correct.

8. Gary C. Eugene's sergeant's application shows Eugene's foreign language skills other than English at the "ADVANCED" level for reading, writing, speaking, and understanding Creole (as well as French).

9. Mario Roman's sergeant's application shows Roman's foreign language skills other than English at the "BEGINNER" level for reading, writing, speaking, and understanding Creole.

10. Prior to making any selections from the November 25, 1992 certification list, the Chief of Police, as he did routinely in making promotions, reviewed the Police Department's personnel files, including copies of the applications for sergeant, of the officers listed.

11. The Chief of Police chose Gary C. Eugene, whose name had been selectively certified on the November 25, 1992 certification list as one of two Haitian/

Creole-speaking individuals remaining on the existing register.

12. A certification list is a list of names certified to a department director – in this case the Police Chief – for consideration for promotion into a vacant position after a Civil Service examination for the position that has been administered and scored and an eligible register has been established by the Director of Human Resources Department. All names on a certification list are taken from the eligible register and include only the names of examinees who passed the examination.

DATED this 14th day of March, 1997.

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Supreme Court, U.S.
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(2)

No. 99-1858

IN THE

Supreme Court of the United States

FRATERNAL ORDER OF POLICE, LODGE #20,

Petitioner,

v.

UNITED STATES OF AMERICA; CITY OF MIAMI; and BOARD OF TRUSTEES OF THE CITY OF MIAMI FIREFIGHTERS AND POLICE OFFICERS RETIREMENT TRUST,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF MIAMI

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I

STATEMENT OF THE CASE

Since 1977, the City of Miami Police Department has promoted police officers in accordance with the promotional goals of a court-approved consent decree designed to eliminate the effects of past discriminatory practices against blacks, Hispanics and women in the workforce. (App. 44). In 1979, in furtherance of these goals, the City amended its civil service rules by adopting Ordinance No. 8977. This rule changed the procedure for promotions from one based strictly on test scores to a more flexible system that provided a greater opportunity for the promotion of qualified minority candidates. (App. 71-76).

In 1993, Petitioner, the Fraternal Order of Police, Lodge #20 ("FOP 20"), brought two motions to hold the City of Miami in civil contempt of the consent decree for discriminating on the basis of race against white and Hispanic police officers in promoting certain black police officers to the rank of lieutenant and sergeant. The FOP 20 contended that in 1992 the City applied Civil Service Rule 8.7 (Sec. 40-88(e)(2), Miami City Code; App. 75) as a pretext for promoting additional black officers over white or Hispanic officers. The facts and circumstances which gave rise to the contempt motions, the historical context in which they occurred and the applicable civil service rules are set forth in detail by the Court of Appeals as an integral part of its decision. (App. 3-7).

The United States of America joined the City of Miami in contesting the motions. No evidentiary hearing took place. Based on stipulated facts and written memoranda, the district court determined that the City's "special certification" of certain minority candidates for promotion to police lieutenant

and police sergeant was discriminatory. The district court held the City in civil contempt of the consent decree and awarded broad "make whole" relief in the form of retroactive promotions, back pay, seniority, pension rights and other monetary benefits to a total of ninety-five police officers whom the district court described as those "adversely affected." [1]

The United States of America and the City of Miami appealed, challenging only the relief granted by the district court, contending: (a) that the district court's remedy was overly broad and excessive in light of the undisputed evidence which showed that the City's discriminatory action resulted in the unlawful promotion of a single black lieutenant and a single black sergeant and that no more than a total of thirty-five officers were adversely affected; (b) that the district court abused its discretion in awarding full compensatory "make-whole" relief to an entire class of police officers as if each of the officers would have received one of the two promotions, when, in fact, there was a much smaller group of identifiable candidates who actually competed for the two vacancies and stood a fractional chance of being promoted; and (c) that the remedy fashioned by the district court, which would have cost the City of Miami several

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1. Although the district court's order does not define the "adversely affected" officer class, the order may be read to include as many as 72 officers to whom the district court awarded retroactive promotions, back pay, and other compensatory relief with respect to the sergeant promotions and an additional 23 officers to whom the district court awarded similar relief with respect to the lieutenant promotions. (App. 28, 30-32). On appeal, the Eleventh Circuit clarified the district court's order and restricted the class to the twenty-three lieutenant and twelve sergeant officers who were actually harmed by the City's discriminatory practice.

million dollars to implement, was so punitive in its effect as to constitute an unlawful sanction for civil contempt.

On appeal, the Eleventh Circuit Court of Appeals concluded that the district court's remedy was excessive and resulted in an unfair and sweeping windfall to the officer class. (App. 18). The Court of Appeals determined that the district court should have relied on a variant of the pro rata method for computing class-wide remedial relief, where only two vacancies were illegally filled by the City's discriminatory selection process and where there were two identifiable groups of candidates who actually competed for each promotion (App 15), and that the amount awarded by the district court so exceeded the monetary value of the lost promotions that the "compensatory" civil contempt sanction was punitive in effect. (App. 19-20). The Court of Appeals vacated the award and remanded the matter to the district court to award each certified officer candidate who actually stood a fractional chance of being promoted a pro rata share of the monetary value of the promotion for which he was eligible. (App. 20-21).

The FOP 20's petitions for rehearing and rehearing en banc were denied. (App. 63).

REASONS FOR DENYING THE WRIT

I.

NEITHER THE RECORD NOR THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS RAISES THE QUESTIONS PRESENTED BY THE PETITION.

The Eleventh Circuit's decision is plainly correct and consistent with the policy and purpose of "make-whole" relief under Title VII. The decision is not in conflict with any decisions of this Court, decisions of the former Fifth Circuit Court of Appeals or of other circuit courts as to the fashioning of "make-whole" relief, whether the relief is to compensate a class of victims of illegal discrimination in the context of a Title VII case, or whether the make-whole relief is used, as it was in the instant case, as a model for assessing an appropriate compensatory sanction in a case of civil contempt for violation of a court-ordered affirmative action plan.

There is nothing in the record to support Petitioner's premise that "an entire class of employees with higher test scores was excluded from consideration for promotion solely on the basis of race." Furthermore, the premise is false, as under the operative civil service rules, promotions were not based on test scores. Yet, this is the unfounded premise upon which Petitioner constructs the second question presented in the petition. Further, Petitioner's assertion on page 4 of the petition that the City "engaged in a policy and practice of reserving specific promotional spots solely for members of a particular race . . ." is grossly inaccurate and misleading. The City's discriminatory act was an isolated occurrence

involving two promotions made in 1992. No illegal city "policy" or "practice" was ever demonstrated. Similarly, the statement of Petitioner that promotional spots were "set aside" or "reserved" on the basis of race is also inaccurate. The undisputed facts in the record refute the notion that the City engaged in any form of racially-based "set asides."

The record demonstrates unequivocally that the City's unlawful "special certification" of additional black candidates and/or Haitian/Creole-speaking candidates did not deprive a single eligible sergeant candidate or lieutenant candidate from being added to the pool of certified, eligible candidates for promotion. The sole effect of the "special certification" was to increase by two or three officers the number of certified candidates who competed for the two slots. By awarding relief to a large number of applicants whose names appeared on the promotional register by virtue of their having passed the promotional exam, but who were not and would not have been eligible to compete for the available slots regardless of the City's wrongful "special certification", the district court impermissibly awarded remedial relief to some 60 officers who were not harmed in any way by the discrimination.

Even if the district court's order can be read to encompass a more limited class of 35 officers, the district court abused its discretion in awarding a remedy which treated each candidate who competed for the two vacancies as if he had a one hundred percent probability of receiving a promotion, when, in fact, each candidate for promotion to lieutenant stood only a one in twenty-three chance of being selected, and each candidate for promotion to sergeant stood only a one in twelve chance of being selected. The district court's award was grossly excessive, as it placed the officers

in the class in a substantially better position than they would have occupied had the discrimination not occurred.

In vacating the district court's order as to the sweeping remedial relief awarded to the entire class of officers and in directing the district court on remand to award each certified officer candidate a pro rata share of the monetary value of the promotion for which they were eligible, the Eleventh Circuit adhered to the purpose of "make-whole" relief under Title VII, that is, to "recreate the conditions and relationships that would have been had there been no 'unlawful discrimination.' " *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 372 (1977) (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769 (1976)). The Eleventh Circuit's decision is also consistent with established policy behind § 706(g) of Title VII that "make-whole" relief should be provided only to those who have been actual victims of illegal discrimination. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 579-80 (1984).

Moreover, the Eleventh Circuit correctly rejected the classwide remedial relief awarded by the district court as an excessive sanction for civil contempt. As the Court of Appeals noted, the amount awarded by the district court so far exceeded the monetary value of the lost promotions (eighteen times greater than the actual value of the two lost promotions), the award was punitive in its effect and inappropriate for a civil contempt sanction. *See International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 828 (1994). (App. 19).

II.

THE ELEVENTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH *TAXMAN v. BOARD OF EDUCATION* OR WITH DECISIONS OF THE FORMER FIFTH CIRCUIT AS TO AN APPROPRIATE COMPENSATORY REMEDY FOR THOSE POLICE OFFICERS ACTUALLY ADVERSELY AFFECTED BY THE CITY'S ACTION.

Petitioner contends that since it was impossible to determine which class members would have been promoted absent the City's discrimination, full compensatory classwide relief to as many as 72 applicants for sergeant promotions and 23 applicants for lieutenant promotions was appropriate and within the sound discretion of the district court. As authority for this contention Petitioner relies on *Taxman v. Board of Education*, 91 F.3d 1547 (3d Cir. 1995), *United States v. United States Steel Corp.*, 520 F.2d 1043 (5th Cir. 1975) and *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974). Petitioner's reading of those cases is simplistic and inaccurate. Furthermore, far from departing from the important principles of "make-whole" relief established in the former Fifth Circuit cases, the Eleventh Circuit espouses those principles and applies them correctly to the facts of the instant case. Petitioner attempts to create a conflict where there is none.

First, the distinction should be noted that *Taxman*, *United States Steel* and *Pettway* are all actions adjudicated under the Civil Rights Act of 1964, § 706(g) as amended 42 U.S.C.A. § 2000e-5(g), and do not involve the fashioning of a compensatory remedy for civil contempt. In fashioning remedial relief for the victims of discrimination under Title

VII, neither the Third Circuit in deciding *Taxman*, nor the former Fifth Circuit in deciding *United States Steel* or *Pettway* was constrained by the rule of law that a sanction for civil contempt must be strictly compensatory in character, and not punitive. *See International Union, United Mine Workers v. Bagwell*, 512 U.S. at 828. While "make-whole" remedies generally available to victims of illegal employment discrimination under Title VII may have provided a valid model for fashioning a remedial sanction for civil contempt in this case, the district court was nonetheless required by law to limit the sanction which it imposed on the City to the actual economic damage caused by the offensive conduct. It failed utterly to adhere to such limitation. The Eleventh Circuit's remedy corrects the district court's error in this regard.

Furthermore, the Eleventh Circuit's decision to reject the district court's award of full remedial relief to the entire class and to prescribe a pro rata methodology for computing appropriate classwide relief in the instant case is in all respects consistent with the precedent established by the former Fifth Circuit's decisions in *United States Steel* and *Pettway*. (App. 16)[2]. Indeed, in *United States Steel* the former Fifth Circuit endorsed just such a methodology for fashioning a classwide remedy when a court could not differentiate between class members. As the Eleventh Circuit notes:

> In the past, we have recommended this specific [pro rata] method when, even after reasonable effort, a court is unable to differentiate

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2. Decisions by the former Fifth Circuit prior to September 30, 1981, are binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

> between class members for remedial relief purposes. *See United States Steel*, 520 F. 2d at 1055-56. In United States Steel, the former Fifth Circuit "commended" to the district court a pro rata methodology where there was a clear proof of systematic race discrimination against a large class of black steelworkers but an unclear methodology for determining which specific individuals deserved backpay relief. *See United States Steel*, 520 F.2d at 1055-56. (App. 16-17).

The Eleventh Circuit's decision also follows the principle established in *Pettway* that classwide remedies must strive for equity to both parties (App. 15), and that the "key is to avoid both granting a windfall to the class at the employer's expense and the unfair exclusion of claimants by defining the class . . . too narrowly." (App 15) (quoting *Pettway*, 494 F.2d at 262 n.152).

The Eleventh Circuit's decision is in accord with decisions of several other circuit courts of appeal which have recommended the pro rata method in similar circumstances. *See Dougherty v. Barry*, 869 F.2d 605, 614-15 (D.C. Cir. 1989); *Ingram v. Madison Square Garden Center, Inc.*, 709 F.2d 807, 812 (2d Cir. 1983); *Hameed v. International Ass'n of Bridge, Structural, & Ornamental Iron Workers, Local Union No. 396*, 637 F. 2d 506, 519-21 (8th Cir. 1980); *Stewart v. General Motors Corp.*, 542 F.2d 445, 452-54 & n.7 (7th Cir. 1976). (App. 16-17).

As the Court of Appeals points out (App. 16 n.5), *Taxman* is the "exception to the rule", readily distinguishable on its facts. Unlike the more typical case in which a large class is competing for a limited number of positions, *Taxman*

involves two teachers of equal seniority and merit, one black and one white, who competed for a single position when the school board was forced to lay off one of the teachers. The school board impermissibly used race to break the tie and laid off the white teacher. The Third Circuit upheld full back pay relief to the teacher who had been laid off, determining that 100% back pay was the appropriate way to restore her to a position of financial equality with the black teacher who retained the job.

The Eleventh Circuit considered *Taxman* and rightly concluded that in contrast to a situation involving just two individuals, where each stood a 50% chance of retaining the position, "the nexus between thirty-five candidates and only two promotion slots [was] far too disproportionate to sustain full remedial relief for the entire class." (App. 19). The Court of Appeals reasoned further that the pro rata method employed in *Dougherty v. Barry* and other circuit court decisions was fairer and more consistent with "the unambiguous goal of 'make-whole' relief . . . to compensate persons who have actually suffered from unlawful discrimination for their actual compensatory losses." (App. 19). In addition, the pro rata method of compensating the class of police officers actually affected by the City's discrimination avoided granting a windfall to the employee class at the employer's expense. (App. 15).

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,

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No. 99-1858

In the Supreme Court of the United States

FRATERNAL ORDER OF POLICE, LODGE NO. 20,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in remedying discrimination based on race in filling two positions by awarding full make-whole relief to each of the 35 claimants who competed for the two positions.

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In the Supreme Court of the United States

No. 99-1858

FRATERNAL ORDER OF POLICE, LODGE NO. 20,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 195 F.3d 1292. The opinion of the district court (Pet. App. 22-32) is unreported.

JURISDICTION

The court of appeals entered its judgment on November 17, 1999. A petition for rehearing was denied on February 11, 2000 (Pet. App. 62-63). The petition for a writ of certiorari was filed on May 9, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1975, the United States filed suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, against the City of Miami, various City officials, and several police officer unions, including petitioner Fraternal Order of Police. Pet. App. 3. The complaint alleged that defendants were engaged in practices that discriminated against black, Hispanic, and female individuals with respect to employment opportunities and conditions of employment. *Ibid.* The United States and the City agreed to settle the case, and, in 1977, the district court approved a consent decree over petitioner's objections. *Ibid.* The decree required the City to establish promotion goals for blacks, Hispanics, and women. *Id.* at 3 & n.1.

At the time the decree was entered, the City's civil service rules required it to promote persons in strict rank order from an eligibility roster that was based on the results of a promotional test. Pet. App. 4. When the United States objected to that method of promotion, the City adopted a method of promotion known as the "Rule of Eight." *Ibid.* Under that rule, the City Director of Personnel Management certifies eight possible candidates for each vacant position. The first five candidates are selected in rank order based on the results of the test. The Director also has discretion to certify the three highest scoring members of the groups protected by the consent decree. *Ibid.* In addition, under Rule 8.7 the Director may certify up to three additional candidates if special qualifications are required. *Id.* at 4-5. The selecting official then chooses from among the certified candidates based on an interview and other subjective factors. *Id.* at 5.

In 1981, the court of appeals vacated the consent decree in part, holding that the portion of the decree that affected petitioner could not be enforced absent petitioner's consent. Pet. App. 5. In 1983, the district court entered a new consent decree to which petitioner consented. *Ibid.*

2. In 1992, the police chief requested the Director to issue a certification list to fill 16 police lieutenant vacancies. Pet. App. 6. The police chief requested the certification of additional black candidates in accordance with Rule 8.7, explaining that black supervisors were needed to blend into certain neighborhoods in which drug operations occurred. *Ibid.* At that time, two of the 29 lieutenants were black. *Ibid.* The Director certified three black candidates pursuant to Rule 8.7, and each of those candidates was selected. *Id.* at 7. Even if the Rule 8.7 procedure had not been used, each of the candidates would have been eligible for consideration under the Rule of Eight. *Ibid.* The use of Rule 8.7, however, made it possible to certify three additional minority candidates under the Rule of Eight. One of those minority candidates was selected. *Ibid.* If Rule 8.7 had not been invoked, that candidate would not have been eligible for consideration under the Rule of Eight. *Ibid.*

In 1992, the City filled five sergeant vacancies. Pet. App. 7. Before filling those vacancies, the police chief requested the Director to certify several Creole-speaking persons under Rule 8.7. *Ibid.* The Director certified two such persons, one black and one Hispanic. Neither would have been eligible for consideration absent Rule 8.7. *Ibid.* The police chief selected the black Creole speaker over the Hispanic Creole speaker for one of the positions. *Ibid.*

In 1993, petitioner filed two contempt motions relating to the 1992 promotions to lieutenant and sergeant. Pet. App. 8. Petitioner alleged that the City had used Rule 8.7 as a pretext for filling lieutenant and sergeant positions on the basis of race. *Ibid.* Based on a joint statement of undisputed facts, the district court granted petitioner's motion for contempt. *Ibid.* The court found that the request for lieutenant candidates who could blend into predominantly black neighborhoods and the request for sergeant candidates who could speak Creole were pretexts for discrimination based on race. *Id.* at 8-9. The court found that, as a result of those requests, the City had filled one lieutenant position and one sergeant position on the basis of race. *Id.* at 9. The court then ordered full make-whole relief to the 23 lieutenant and 12 sergeant candidates who were bypassed in favor of the two candidates who obtained positions as a result of the City's special certification rule. *Id.* at 9-10. In particular, the court awarded all 35 persons full backpay, retroactive seniority, a $15,000 lump sum pension, and a promotion. *Id.* at 10-11. That remedy would cost the City approximately $9 million. *Id.* at 18.

3. The court of appeals vacated and remanded, Pet. App. 1-21, holding that the district court's award of full make-whole relief to each member of the class was excessive. *Id.* at 2. The court noted that the purpose of "make-whole" relief is to "'recreate the conditions and relationships that would have been had there been no' unlawful discrimination." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 372 (1977) (quoting *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 769 (1976)). The court found that, in the absence of discrimination, only one of the 23 lieutenant candidates and only one of the 12 sergeant candidates who were

not promoted would have received a promotion. Pet. App. 13. Because it is "difficult, if not altogether impossible" to determine which of those candidates would have been promoted, the court explained, a classwide remedy is appropriate. *Ibid.* The court emphasized, however, that a classwide remedy must avoid providing a windfall to the class at the employer's expense. The court concluded that the district court's remedial order ran afoul of that principle. *Id* at 15. The court explained that the district court's remedy treated each member of the class as having a 100% chance of receiving a promotion in the absence of discrimination, when each lieutenant candidate stood only a one in 23 chance and each sergeant candidate stood only a one in 12 chance of promotion. *Ibid.*

The court held that the appropriate remedy in this case was to award each member of the class a proportional share of the monetary value of the promotion for which he or she was eligible. Pet. App. 15. Thus, the court directed that each certified lieutenant not selected for promotion should receive a one-twenty-third share, and each certified sergeant not selected for promotion should receive a one-twelfth share, of the value of the promotion. *Id.* at 15-16. The court noted that such an approach is consistent with binding Fifth Circuit precedent and with the approach adopted in other circuits. *Id.* at 16-17. The court distinguished the decision in *Taxman* v. *Board of Education* 91 F.3d 1547 (3d Cir. 1996), cert. granted, 521 U.S. 1117, cert. dismissed, 522 U.S. 1010 (1997), on the ground that the "probability of retention" of the teacher who was laid off in that case was fifty percent, which was "closely approximate to a more likely than not standard." Pet. App. 16 n.5.

ARGUMENT

Petitioner contends that the court of appeals erred in holding that the district court abused its discretion when it remedied discrimination in the filling of two positions by awarding full make-whole relief to 35 persons. That contention is without merit and does not warrant review.

1. The decisions of this Court establish that, in fashioning a remedy for employment discrimination, a district court should attempt to "'recreate the conditions and relationships that would have been had there been no' unlawful discrimination." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 372 (1977) (quoting *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 769 (1976)). Thus, when a court can identify the person who would have received a position in the absence of discrimination, an award of full make-whole relief to that person is ordinarily appropriate. *Franks*, 424 U.S. at 764-766.

In some circumstances, however, it may be impossible to determine who would have received a position in the absence of discrimination. For example, when there is a single vacancy, and a class of persons has been excluded from consideration for that vacancy on the basis of race, it may be impossible to reconstruct which member of the class would have received the position in the absence of discrimination. The courts of appeals have adopted a uniform approach for dealing with that problem. That approach is to award each of the persons bypassed a pro rata share of the value of the promotion that reflects each person's likelihood of having received the promotion. *Dougherty* v. *Barry*, 869 F.2d 605, 614-615 (D.C. Cir. 1989); *Ingram* v. *Madison Square Garden Ctr., Inc.*, 709 F.2d 807, 812

(2d Cir.), cert. denied, 464 U.S. 937 (1983); *Hameed* v. *International Ass'n of Bridge Workers*, 637 F.2d 506, 519-521 (8th Cir. 1980); *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 452-454 & n.7 (7th Cir. 1976), cert. denied, 433 U.S. 919 (1977); *United States* v. *United States Steel Corp.*, 520 F.2d 1043, 1055-1056 (5th Cir. 1975), cert. denied, 429 U.S. 817 (1976). That approach does not perfectly replicate the conditions that would have existed in the absence of discrimination. But it avoids the inequities of the other alternatives. Denying all relief would ignore the equities of those who may have suffered from discrimination and would reward the employer's discrimination. On the other hand, granting full make-whole relief to each member of the class would provide a windfall to the class and would amount to a punitive sanction against the employer.

The court of appeals in this case correctly followed the pro rata approach. The district court found that the City discriminated on the basis of race in filling one lieutenant position and one sergeant position. But it could not determine which of the 23 lieutenant candidates who were bypassed would have received that promotion in the absence of discrimination. Nor could it determine which of the 12 sergeant candidates who were bypassed would have received that promotion in the absence of discrimination. In those circumstances, the court of appeals correctly held that each of the 35 candidates should receive a pro rata share of the value of the two promotions, and that the district court had abused its discretion in awarding full make-whole relief to all 35.

The facts of this case dramatically illustrate why pro rata relief is appropriate and full make-whole relief is excessive. Even though the City's discrimination affected only two positions, having a value of approxi-

mately $516,000, the district court's make-whole relief would cost the City approximately $9 million. Pet. App. 18 & n.6. As the court of appeals explained, that award "amounts to an unfair and sweeping windfall to the officer class," *id.* at 18, and "is so excessive as to be punitive," *id.* at 20. Moreover, as the court of appeals concluded, "the district court's award of thirty-five retroactive promotions, where absent the City's discrimination only two additional promotions would have been available, could radically restructure the City's police force by creating many more lieutenants and sergeants than the City sought fit to create under its own promotion policies." *Ibid.*

2. Petitioner contends that the decision below conflicts with the Third Circuit's decision in *Taxman* v. *Board of Education*, 91 F.3d 1547 (1996), cert. granted, 521 U.S. 1117, cert. dismissed, 522 U.S. 1010 (1997). There is, however, no such conflict. In *Taxman*, a school system used race, rather than its ordinary practice of flipping a coin, as the basis for laying off one teacher rather than another. The court of appeals upheld an award of full backpay, even though the teacher subjected to discrimination would have had only a 50% chance of retaining her job in the absence of discrimination. *Id.* at 1565-1566. The court of appeals reasoned that, "[w]hile Taxman cannot be returned to the position that she held prior to her layoff—one of virtually precise equality with Williams in terms of the factors relevant to the decision—she can be returned to a position of financial equality with Williams through a one hundred percent backpay award." *Id.* at 1565. The court therefore concluded that an award of full backpay "most closely approximates the conditions that would have prevailed in the absence of discrimination." *Id.* at 1565-1566. The court also emphasized that, since Tax-

man had a 50% chance of retaining her job, the school board could not carry its burden of showing by a preponderance of the evidence that Taxman would have received something less than a full backpay award if her race had not been taken into account. *Id.* at 1566.

The circumstances that justified a full backpay award in *Taxman* are not present here. In *Taxman*, one discrimination claimant was competing for one job. In contrast, in this case, 35 discrimination claimants were competing for two jobs. In *Taxman*, the evidence supported a finding that the teacher subjected to discrimination would have retained her job (because the employer could not show by a preponderance of evidence that—as one of two claimants—she would not). In this case, by contrast, the evidence supports no such finding; instead it supports the finding that each lieutenant candidate claiming discrimination had only a one in 23 chance of receiving a promotion, and each sergeant candidate claiming discrimination had only a one in 12 chance of receiving a promotion. Thus, while awarding full backpay in *Taxman* approximated the conditions that would have existed in the absence of discrimination, awarding full make-whole relief to each of the 35 persons claiming discrimination in this case would provide a huge windfall to the class of claimants and unfairly penalize the employer. *Taxman* is therefore inapposite here.

Petitioner also contends that the decision below conflicts with the Fifth Circuit's decisions in *U.S. Steel*, 520 F.2d at 1055-1056, and *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 262 n.152 (1974), cert. denied, 439 U.S. 1115 (1979) because those decisions recognize that district courts possess wide discretion to fashion appropriate relief. In *U.S. Steel*, however, the court of appeals specifically commended the use of pro

rata shares in those instances in which it could not be determined which member of a class of claimants would have received a position in the absence of discrimination. 520 F.2d at 1055-1056. *Pettway* similarly suggested pro rata shares as an appropriate remedy where individualized determinations are impossible. 494 F.2d at 263 & n.154. While those cases make clear that a district court has discretion to select other "reasonable alternatives," *U.S. Steel*, 520 F.2d at 1056, neither case provides support for the excessive and punitive remedy adopted by the district court in this case. To the contrary, in both cases, the court of appeals emphasized that any remedy must avoid providing a "windfall to the class at the employer's expense." *Id.* at 1055; *Pettway*, 494 F.2d at 262 n.152. The court of appeals in this case faithfully followed that principle.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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